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NEBRASKA WORKMEN'S COMPENSATION FOR AGGRAVATION OF PRE-EXISTING INFIRMITIES BY EXERTION OR STRAIN

John M. Gradwohl*

The recent United States National Health Survey indicates that almost one out of six workers has some sort of known chronic or permanent physical impairment.¹ On any given work day, an undetermined number of additional workers would have various sorts of lesser physical infirmities ranging from minor ailments, such as small cuts or common colds, to really serious physical limitations. Many more workers would have undetected and unknown physical infirmities. This article will examine the extent to which these workers may be entitled to compensation under the Nebraska Workmen's Compensation Law for work-connected aggravation of their pre-existing infirmities by exertion or strain.

I. GENERAL COMPENSATION RULES CONCERNING AGGRAVATION OF PRE-EXISTING INFIRMITIES

The workmen's compensation statute, if applicable to the parties, covers "every case of injury or death caused by accident or occupational disease arising out of and in the course of employment."² "Injury" is defined to mean "only violence to the physical structure of the body and such disease or infection as naturally results therefrom."³ The term "accident" is to "be

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¹ U.S. PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION, AND WELFARE, BULL. NO. 9, HEALTH STATISTIC: INFIRMITIES 11 (Series B 1959).

² NEB. REV. STAT. § 48-109 (Reissue 1960).

³ NEB. REV. STAT. § 48-151(4) (Reissue 1960). The section specifically excludes from coverage "disability or death due to natural causes but occurring while the employee is at work."

construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."⁴

The definition of "injury" contains language that it "shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease."⁵ "Occupational disease" is an extremely limited term meaning "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed."⁶ There is no specific statutory reference to the problems of aggravation of any other sort of pre-existing infirmity.⁷

By case law, it has become well settled that where an injury combines with a pre-existing disease⁸ or other physical infirmity⁹

⁴ NEB. REV. STAT. § 48-151(2) (Reissue 1960).

⁵ NEB. REV. STAT. § 48-151(4) (Reissue 1960).

⁶ NEB. REV. STAT. § 48-151(3) (Reissue 1960).

⁷ Where an employee refuses or neglects to avail himself of medical or surgical treatment furnished by the employer, the statute states that "the employer shall not be liable for an aggravation of such injury due to such refusal and neglect." NEB. REV. STAT. § 48-120 (Reissue 1960). For the effect of the second injury fund, see note 13 *infra*.

⁸ *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960); *Gourley v. City of Grand Island*, 168 Neb. 538, 96 N.W.2d 309 (1959); *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 891 (1948); *Dryden v. Omaha Steel Works*, 148 Neb. 1, 26 N.W.2d 293 (1947); *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946); *Schwabauer v. State*, 147 Neb. 620, 24 N.W.2d 431 (1946); *Yakal v. Henkle & Joyce Hardware Co.*, 145 Neb. 365, 16 N.W.2d 531 (1944); *Palmer v. Sample*, 141 Neb. 36, 2 N.W.2d 583 (1942); *Schirmer v. Cedar County Farmers Tel. Co.*, 139 Neb. 182, 296 N.W. 875 (1941); *City of Omaha v. Casaubon*, 138 Neb. 608, 294 N.W. 389 (1940); *Chatt v. Massman Constr. Co.*, 138 Neb. 288, 293 N.W. 105 (1940); *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N.W. 532 (1939); *Miller v. Central Coal & Coke Co.*, 123 Neb. 793, 244 N.W. 401 (1932); *Watkins v. Brunswick Restaurant Co.*, 123 Neb. 212, 242 N.W. 439 (1932); *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N.W. 688 (1930); *Nebraska Nat'l Guard v. Morgan*, 112 Neb. 432, 199 N.W. 557 (1924); *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922).

⁹ *Plambeck v. Natkin & Co.*, 171 Neb. 774, 107 N.W.2d 734 (1961); *Pittenger v. Safeway Stores, Inc.*, 166 Neb. 858, 91 N.W.2d 31 (1958); *Knudsen v. McNeely*, 159 Neb. 227, 66 N.W.2d 412 (1954); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950); *Dymak v. Haskins Bros.*, 132 Neb. 308, 271 N.W. 860 (1937); *Marler v. Grainger Bros.*, 123 Neb. 517, 243 N.W. 622 (1932); *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929).

to produce disability, the employee is entitled to compensation.¹⁰ This is true whether the injury causes a resulting disability which is itself more severe than it would have been had there been no pre-existing infirmity, or whether the injury merely accelerates or aggravates the pre-existing impairment to a state of disability which is not the result of a natural progression of the impairment.¹¹ There is no requirement that the accident be one which would have produced disability by itself were it not for the presence of the pre-existing infirmity.¹² Where an employee sustains a compensable aggravation of a pre-existing impairment, he normally is entitled to workmen's compensation disability benefits based upon his resulting condition without reduction

¹⁰ Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 10 (1961).

¹¹ *Plambeck v. Natkin & Co.*, 171 Neb. 774, 107 N.W.2d 734 (1961); *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960); *Gourley v. City of Grand Island*, 168 Neb. 538, 96 N.W.2d 309 (1959); *Pittenger v. Safeway Stores, Inc.*, 166 Neb. 858, 91 N.W.2d 31 (1958); *Turner v. Beatrice Foods Co.*, 165 Neb. 338, 85 N.W.2d 721 (1957); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950); *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 891 (1948); *Dryden v. Omaha Steel Works*, 148 Neb. 1, 26 N.W.2d 293 (1947); *Schwabauer v. State*, 147 Neb. 620, 24 N.W.2d 431 (1946); *Yakal v. Henkle & Joyce Hardware Co.*, 145 Neb. 365, 16 N.W.2d 531 (1944); *Palmer v. Sample*, 141 Neb. 36, 2 N.W.2d 583 (1942); *Schirmer v. Cedar County Farmers Tel. Co.*, 139 Neb. 182, 296 N.W. 875 (1941); *City of Omaha v. Casaubon*, 138 Neb. 608, 294 N.W. 389 (1940); *Chatt v. Massman Constr. Co.*, 138 Neb. 288, 293 N.W. 105 (1940); *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N.W. 532 (1939); *Dymak v. Haskins Bros.*, 132 Neb. 308, 271 N.W. 860 (1937); *Miller v. Central Coal & Coke Co.*, 123 Neb. 793, 244 N.W. 401 (1932); *Marler v. Grainger Bros.*, 123 Neb. 517, 243 N.W. 622 (1932); *Watkins v. Brunswick Restaurant Co.*, 123 Neb. 212, 242 N.W. 439 (1932); *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N.W. 688 (1930); *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929); *Nebraska Nat'l Guard v. Morgan*, 112 Neb. 432, 199 N.W. 557 (1924); *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922).

¹² *Pittenger v. Safeway Stores, Inc.*, 166 Neb. 858, 91 N.W.2d 31 (1958); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950); *Yakal v. Henkle & Joyce Hardware Co.*, 145 Neb. 365, 16 N.W.2d 531 (1944); *Schirmer v. Cedar County Farmers Tel. Co.*, 139 Neb. 182, 296 N.W. 875 (1941); *Chatt v. Massman Constr. Co.*, 138 Neb. 288, 293 N.W. 105 (1940); *Dymak v. Haskins Bros.*, 132 Neb. 308, 271 N.W. 860 (1937); *Miller v. Central Coal & Coke Co.*, 123 Neb. 793, 244 N.W. 401 (1932); *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N.W. 688 (1930); *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929); *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922).

for the contributing factor of the pre-existing infirmity.¹³ The unsettled legal issues concerning recovery for aggravation of pre-existing infirmities lie primarily in the area of determining factually whether there has been aggravation "by accident" within the meaning of the statute.

II. DEVELOPMENT OF THE ACCIDENT REQUIREMENT

The accident requirement in American compensation statutes was patterned after the English Workmen's Compensation Act of 1897¹⁴ which covered "personal injury by accident arising out

¹³ See notes 8 and 9 *supra*. Under the second injury fund provision, NEB. REV. STAT. § 48-128 (Reissue 1960), an employee with a "previous disability other than one caused by disease" who suffers a permanent total disability is entitled to benefits based upon his total resulting condition. See *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952). The Nebraska Supreme Court has not yet ruled on the amount of compensation payable to an employee with a previous disability who suffers additional work connected disability, but whose resulting condition is less than total permanent disability. From a literal reading of the compensation statute, there would seem to be no reason why these employees, like all employees generally, are not entitled to compensation benefits based upon their total resulting condition without reduction for the factor of the previous disability. In practice, however, the compensation court reasons that the employer is responsible only for the disability caused by the employment. The compensation court deducts from a subsequent award the amount of any previous disability existing at the time of the accident. The formula appears to be based upon total resulting condition less pre-existing disability. This amount could be significantly different than the amount charged to the employer if the second injury fund statute were applied. Under that statute, "the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any pre-existing disability." The present position of the compensation court appears to be quite similar to the apportionment statute which was a part of the Nebraska statutes from 1913 to 1947, but which would seem to have been repealed by the 1947 amendment establishing the second injury fund. See notes 53-55 *infra*. In any event, both the compensation court and the supreme court interpret the term "previous disability" to mean only an inability to perform the duties of the employment on a day to day basis, or a substantial physical loss of a body function. See note 56 *infra*. An employee with an infirmity which would have been, or was, a compensable disability under the statute does not necessarily have a "previous disability" at the time of a subsequent injury, if (1) the disability has been cured at the time of the subsequent injury, or (2) the disability did not interfere with the employee's performance of his duties or constitute a substantial physical loss of a body function.

¹⁴ 60 & 61 Vict. c. 37, § 1(1) (repealed). This language was repeated in the Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, § 1(1) (repealed).

of and in the course of the employment." No definition of "by accident" appeared in the statute but it was generally thought to involve something which was at least "unexpected" or "unforeseen." Immediately, however, the term caused a sharp disagreement about the basic coverage of the compensation statute. A literal reading could lead to the conclusion that the statute required either (a) that the "cause" of the personal injury must be "by accident," or (b) that only the resulting personal injury, itself, apart from its "cause," need be "by accident." An answer to the question whether it was the "cause" of injury which must be unexpected or the "result" could make a difference in the outcome of a significant number of cases under the compensation system. Where the routine exertion of normal work of an employee had caused a break-down in his internal body, there might have been no accidental cause of the injury, and yet the injury, alone, might be accidental in the sense of being unexpected and unforeseen.

In *Hensley v. White*,¹⁵ a cabinet maker died of a ruptured blood vessel in his stomach caused by strain while he was attempting to start a gas engine which was stiff from disuse during the Christmas holidays. The Court of Appeals in 1900 denied recovery since this was a part of the employee's normal duties and did not involve a "fortuitous element."

Three years later, in *Fenton v. Thorley & Co.*,¹⁶ the House of Lords overruled *Hensley v. White* in a decision which has been followed during succeeding years.¹⁷ A machinist was ruptured in attempting to move a stuck wheel on his machine. The employee was doing his ordinary work in an ordinary way; there was no slip, wrench or sudden jerk.¹⁸ In allowing recovery on the basis that the unexpected rupture constituted "personal injury by accident," the opinion of Lord Macnaghten, after analyz-

¹⁵ [1900] 1 Q.B. 481. There was evidence that the strain accelerated the previous physical infirmity. In a companion case, the court denied recovery to an employee who aggravated a blistered finger by working with red lead and oil because he was at the time working in the ordinary way and with the usual materials and appliances. *Walker v. Lilleshall Coal Co.*, [1900] 1 Q.B. 488.

¹⁶ [1903] A.C. 443.

¹⁷ This line of decisions has continued to be followed under the present national industrial injuries provisions which cover "personal injury caused . . . by accident arising out of and in the course of such employment." See 16 Halsbury Stat. (Eng.) 801-02 (2d ed. 1950).

¹⁸ Opinion of Lord Macnaghten, *Fenton v. Thorley & Co.*, [1903] A.C. 443, 445: "Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It

ing the language of the statute, stated:¹⁹ "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." Lord Robertson added:²⁰

No one out of a Law Court would ever hesitate to say that this man met with an accident, and, when all is said, I think this use of the word perfectly right. . . . In the present instance the man by an act of over-exertion broke the wall of his abdomen. . . . [S]uppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the Act is in this case exactly the same—that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence to them, which is the element or mischance, mishap, or misadventure.

The House of Lords re-examined and reaffirmed this interpretation in *Clover, Clayton & Co. v. Hughes*²¹ in 1910. At the time

may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish."

¹⁹ *Id.* at 448. Lord Shand said: "But I agree with my noble and learned friend [Lord Macnaghten] in thinking that the words 'personal injury by accident' and 'accident' are used in the statute in the popular and ordinary sense of these words. . . . I shall only add that, concurring as I fully do in holding that the word 'accident' in the statute is to be taken in its popular and ordinary sense, I think that it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence." *Id.* at 451. Lord Lindley concurred in the result of the decision, but would have rested the decision on the ground that the rupture constituted a personal injury and the accident which caused it was the unintended and unexpected resistance of the stuck wheel to the force which was applied to it. *Id.* at 455.

²⁰ *Id.* at 452.

²¹ [1910] A.C. 242 (3-2 decision). Compensation was awarded for the death of a workman from the rupture of an aneurism brought on by the tightening of a nut with a spanner, the strain being quite ordinary in his ordinary work. The aneurism was so advanced that it might have burst at any time. The two dissenting Lords, while formally rejecting an ordinary exertion test, did not urge that the basic definition of *Fenton v. Thorley* be overruled. For example, Lord Atkinson, dissenting, stated: "I think the meaning put upon the word 'accident' in *Fenton v. Thorley* must now be accepted in all cases turning on the construction of the phrase 'injury by accident' used in the Workmen's Compensation Act, 1906, as its true meaning, namely, 'an unlooked for mishap or an untoward event which is not expected or designed.'" *Id.* at 250. The basis for

the American definitions were borrowed from it, the English law had become settled that "by accident" included all unexpected work-connected injuries, whether or not the precise cause was unexpected.²² Specifically, it was clear that an employee was entitled to compensation for injuries resulting from exertion or strain in performing his ordinary duties.

Seven states, California, Iowa, Massachusetts, Michigan,²³ Minnesota,²⁴ Rhode Island, and Texas²⁵ and the Federal Em-

Lord Atkinson's dissent appears to be primarily the matter of factual causation. Lord Shaw, dissenting, argued for a narrower application of Lord Macnaghten's definition as requiring some unusual or abnormal strain.

²² See 1 LARSON, *WORKMEN'S COMPENSATION LAW* § 38.10 (1952); Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 340 (1912).

²³ *Mottonen v. Calumet & Hecla, Inc.*, 360 Mich. 659, 105 N.W.2d 33 (1960). For an exceedingly interesting account of the struggle which the Michigan Supreme Court went through to hold that "accident" was no longer required, see *Coombe v. Penegor*, 348 Mich. 635, 83 N.W.2d 603 (1957); *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957); *Wieda v. American Box Bd. Co.*, 343 Mich. 182, 72 N.W.2d 13 (1955).

²⁴ The Minnesota accident requirement, which had been virtually identical to that of Nebraska, was deleted in 1953 as a result of the *Report of the Interim Commission on Workmen's Compensation to Revise and Codify the Laws of Minnesota Relating to Workmen's Compensation* 57 (1953): "The use of the phrase 'by accident' is nothing but the remnant of bygone days when occupational diseases were outside the purview of the Act. Today the course of the decisions of the Supreme Court of this state and other jurisdictions shows that the clause 'by accident' has lost any practical significance and that the words in question have at best a nuisance value.

"The elimination of the words 'caused by accident' and their definition from the statute would not markedly broaden the scope of the statutory protection but merely help to rid the law of meaningless and confusing restrictions. Other states have long taken this course. . . . The Commission is convinced that compensable harm is sufficiently identified and delimited by the terms 'personal injury arising out of and in the course of the employment, including personal injury caused by occupational disease' as defined by the Act." See *Gillette v. Harold, Inc.*, 257 Minn. 313, 101 N.W.2d 200 (1960) (compensation allowed to seventeen-year sales lady in a ladies' ready to wear store for a deteriorative disorder of the big toe resulting in stiffness from standing and walking most of the time at work).

²⁵ TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (1956) (injury means "damage or harm to the physical structure of the body"); *Texas Employers' Ins. Ass'n v. Agan*, 252 S.W.2d 743 (Tex. Civ. App. 1952); *Texas Employers' Ins. Ass'n v. Mincey*, 255 S.W.2d 262 (Tex. Civ. App. 1953). Some Texas cases specifically involving exertion, however,

ployees Compensation Act have eliminated the accident requirement. The other forty-three states have retained various forms of a requirement of accident.²⁶

seem to proceed on a basis of accidental injury. See *Gorman v. American Gen. Ins. Co.*, 179 S.W.2d 814 (Tex. Civ. App. 1944); *Traders & Gen. Ins. Co. v. Rooth*, 268 S.W.2d 539 (Tex. Civ. App. 1954).

²⁶ Twenty-nine states, including Nebraska, still require that the injury be "by accident" or "by an accident." ALA. CODE tit. 26, § 253 (1958); ALASKA COMP. LAWS ANN. § 43-3-41(9) (Supp. 1959); ARIZ. REV. STAT. ANN. § 23-1021A (1956); COLO. REV. STAT. ANN. § 81-13-2 (3) (1953); DEL. CODE ANN. tit. 19, § 2304 (1953); FLA. STAT. § 440.02 (6) (1959); GA. CODE ANN. § 114-102 (1956); HAWAII REV. LAWS § 97-3 (1955); IDAHO CODE ANN. § 72-201 (1949); IND. ANN. STAT. § 40-1202 (Supp. 1961); KAN. GEN. STAT. ANN. § 44-501 (1949); KY. REV. STAT. § 342.005 (Supp. 1960); LA. REV. STAT. § 23:1031 (1951); ME. REV. STAT. ANN. c. 31, § 8 (1954); MO. ANN. STAT. § 287.120(1) (1952); NEB. REV. STAT. § 48-109 (Reissue 1960); NEV. REV. STAT. § 616.270(1) (Supp. 1957); N.J. STAT. ANN. § 34:15-7 (1959); N.M. STAT. ANN. § 59-10-6(c) (1953); N.C. GEN. STAT. §§ 97-2(6), -3 (1958); N.D. CENT. CODE § 65-01-02(8) (1960); PA. STAT. ANN. tit. 77, §§ 411, 431 (1952); S.C. CODE §§ 72-14, -101 (1952); S.D. CODE § 64-0105 (1939); TENN. CODE ANN. §§ 50-902(d), -903 (1955); UTAH CODE ANN. § 35-1-45 (1953); VT. STAT. tit. 21, § 618 (1959); VA. CODE ANN. § 65-7 (1950); WIS. STAT. ANN. § 102.01(2) (1957 and Supp. 1961). Eight states require "accidental injury" or "accidental personal injury." ARK. STAT. § 81-1302(d) (1960); CONN. GEN. STAT. ANN. § 31-139 (1960); ILL. REV. STAT. c. 48, §§ 138.7, .8 (1959); MD. ANN. CODE art. 101, § 15 (1957); MISS. CODE ANN. §§ 6998-02(02), -04 (Supp. 958); N.H. REV. STAT. ANN. § 281:2(III) (Supp. 1959); N.Y. WORKMEN'S COMP. LAW § 2(7); OKLA. STAT. tit. 85, § 11 (Supp. 1959). It was suggested in an article by Professor Bohlen that a change from the phrase "by accident" to "accidental injury" would operate to allow recovery for injuries which develop over an extended period of time. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 338-46 (1912). But this distinction has not been adopted in most of the states requiring "accidental injury." Six states do not fall clearly into either of the above categories but nevertheless require accident in one form or another. MONT. REV. CODES ANN. § 92-418 (Supp. 1961) (injury means "a tangible happening of a traumatic nature from an unexpected cause, resulting in either external or internal physical harm . . ."); *Murphy v. Anaconda Co.*, 133 Mont. 198, 321 P.2d 1094 (1958); OHIO REV. CODE ANN. § 4123.01 (Page Supp. 1960) (injury includes "any injury, whether caused by external accidental means or accidental in character or result . . ."); ORE. REV. STAT. §§ 656.002(19), .152 Supp. 1959) ("injury is accidental if the result is an accident, whether or not due to accidental means"); WASH. REV. CODE § 51.08.100 (Supp. 1957) (injury means "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without."); W. VA. CODE c. 23, art. 4, § 1 (1955) (compensation is provided for employees who "shall have received personal injuries in the course of and resulting from their employment . . ."); *Gilbert v. State Compensation Comm'r*, 121

Following the pattern of the English act, most states do not have a statutory definition of "accident." Alabama, Louisiana, Missouri, and Nevada have statutory definitions like that of Nebraska.²⁷ All seven state statutes defining "accident" have some sort of a requirement of "unexpected or unforeseen event,"²⁸ which would seem to be merely a codification of the previous judicial definition discussed above.²⁹

W. Va. 10, 1 S.E.2d 167 (1939); WYO. STAT. ANN. §§ 27-49, -50, -78, -104 (1957) (The act requires compensation for "persons injured." Injury is not defined. A requirement that an accident report be filed seems to infer that accident is required.); Wright v. Wyoming State Training School, 71 Wyo. 173, 255 P.2d 211 (1953); *In re Pero*, 49 Wyo. 131, 52 P.2d 690 (1935).

²⁷ NEB. REV. STAT. § 48-151(2) (Reissue 1960) states: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See MO. ANN. STAT. § 287.020(2) (Supp. 1960); NEV. REV. STAT. § 616.020 (Supp. 1959). In ALA. CODE tit. 26, § 262(i) (1958), the relevant terms are identical except that in place of "objective symptoms" it requires "injury to the physical structure of the body." The relevant wording of LA. REV. STAT. § 23:1021 (1951) is like Nebraska's statute except that in place of "suddenly and violently" it requires only "suddenly or violently." Minnesota originally had a similar statute, but has since eliminated the entire accident requirement. Minn. Laws c. 467, § 34(h), p. 693 (1913).

²⁸ ALA. CODE tit. 26, § 262(i) (1958); FLA. STAT. § 440.02 (19) (1959); IDAHO CODE ANN. § 72-201 (1949); LA. REV. STAT. § 23:1021(1) (1951); MO. ANN. STAT. § 287.020(2) (Supp. 1960); NEB. REV. STAT. § 48-151(2) (Reissue 1960); NEV. REV. STAT. § 616.020 (Supp. 1959).

²⁹ For this language, see notes 19 to 21 *supra* and accompanying text. In *Fenton v. Thorley & Co.*, [1903] A.C. 443, 446-48, Lord Macnaghten reasoned as follows: "[T]he learned judges of the Court of Appeal held in *Hensey v. White* [1900] 1 Q.B. 481, as they have held here, that there was no accident, because (to quote the leading judgment) there was 'an entire lack of the fortuitous element.' What the man 'was doing,' it was said, 'he was doing deliberately, and in the ordinary course of his work, and that which happened was in no sense a fortuitous event.' To the expression as used by Lord Halsbury in the passage in which it occurs no possible objection can be taken; but it is, I think, to be regretted that the word fortuitous should have been applied to the term injury by accident in the Workmen's Compensation Act. If it means exactly the same thing as accidental the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word 'accidental,' its use, I venture to think, is misleading, and not warranted by anything in the Act. . . . If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be

Nebraska and seven other states require "happening sudden-

described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him. . . . A man injures himself by doing some stupid thing, and it is called an accident and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. . . . I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." Lord Lindley stated: "Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or hurt itself would certainly be called an accident. The word accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness, but for legal purposes it is often important to distinguish careless from other unintended and unexpected events. In this Act of Parliament the word is used in a very loose way." *Id.* at 453. In *Clover, Clayton, & Co. v. Hughes*, [1910] A.C. 242, 245-46, Lord Loreburn stated: "The first question here is whether or not the learned judge was entitled to regard the rupture as an 'accident' within the meaning of this Act. In my opinion he was to be entitled. Certainly it was an 'untoward event.' It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. . . . No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due to both internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think that it may also be something going wrong within the human frame itself, such as the straining of a muscle, or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism, when tightening a nut with a spanner, may be regarded as an accident." Lord Macnaughten stated: "The fact that the result would have been expected, or, indeed, contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case is, I think, nothing to the purpose. An occurrence I think is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen." *Id.* at 250.

ly."³⁰ Five statutes require physical violence as an essential element of recovery.³¹ This could involve a significant change from the English definition, under which recovery was given to a worker sorting bales of wool when a bacillus of anthrax alighted in his eye killing him.³² The House of Lords felt that there was no difference between the bacillus landing on the eye and a spark from an anvil, but perhaps the statutory requirement of violence would change this rule.

Four statutes require "objective symptoms" (although not necessarily "at the time").³³ Three statutes require that the cause of harm be external to the body,³⁴ and one requires that the accident must be definitely located as to the time and place where it occurred.³⁵

It is significant from this historical and statutory analysis that although the Nebraska Legislature added several requirements to the previous definition of accident contained in the then existing law as expressed in the English decisions, no requirement was included that the cause of the harm be unexpected or unforeseen. The use of the phrase "unexpected or unforeseen event" would appear to be a statutory codification of the English judicial definition going back to Lord Macnaghten's words. The fact that Nebraska has employed part of the judicial definition and changed part would seem to indicate a purpose to incorporate the unchanged portion of the English judicial definition that an unexpected injury is an accident even though the means of producing the injury may not have been unexpected.³⁶

³⁰ ALA. CODE tit. 26, § 262 (1958); FLA. STAT. § 440.02(6) (1959); IDAHO CODE ANN. § 72-201 (1949); LA. REV. STAT. § 23:1021 (1951) (suddenly or violently); MO. ANN. STAT. § 287.020 (Supp. 1960); NEB. REV. STAT. § 48-151(2) (Reissue 1960); NEV. REV. STAT. § 616:020 (Supp. 1957); WASH. REV. CODE § 51.08.100 (Supp. 1957) ("sudden and tangible happening").

³¹ See statutes cited note 27 *supra*.

³² *Brittons, Ltd. v. Turvey*, [1905] A.C. 230.

³³ LA. REV. STAT. § 23:1021 (1951); MO. ANN. STAT. § 287.020 (Supp. 1960); NEB. REV. STAT. § 48-151 (Reissue 1960); NEV. REV. STAT. § 616:020 (Supp. 1959). See also WASH. REV. CODE § 51.08.100 (Supp. 1957) ("producing an immediate or prompt result").

³⁴ ALA. CODE tit. 26, § 262 (1958) ("by accidental means"); NEV. REV. STAT. § 616.110 (Supp. 1957) ("from external force"); WASH. REV. CODE § 51.08.100 (Supp. 1957) ("occurring from without").

³⁵ IDAHO CODE ANN. § 72-201 (1949).

³⁶ See, e.g., *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942): "The language of our unemployment compensation law quoted above [dealing with stoppage of work] was a substantial reenactment

III. THE INITIAL PERIOD—1914 TO 1934

Throughout this period, the decisions of the Nebraska Supreme Court consistently applied the English rule that for workmen's compensation purposes an unexpected injury from ordinary work constitutes an accident. For twenty years, the court allowed compensation for injury from exertion or strain without regard to the severity of the exertion, and without regard to whether or not the exertion was a part of the performance of the regular duties of the employee.

In 1917, in *Manning v. Pomerene*,³⁷ a steam fitter's helper, in what the court labeled a part of his expected duties,³⁸ attempted to push two steel "T" beams across the floor. The opinion noted that these beams resting upon iron would usually slide easily when pushed.³⁹ The employee ruptured a blood vessel and suffered a paralytic stroke. The court referred to the statutory definition of "accident" and permitted recovery, stating:⁴⁰

It is insisted that no "unexpected or unforeseen event, happening suddenly and violently," occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back and forwards could not reasonably be said to be "an unforeseen event;" and that it did not happen suddenly and violently except as it was produced by the plaintiff himself. It is said that this language was "clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some break-

of the English National Insurance Act of 1911. This language, it appears, had received a settled construction by the English authorities charged with the administration of this English act long prior to the adoption of it by ourselves. The well-established rule of construction applicable to this Nebraska enactment, under these circumstances, is that a state by adopting a statute of another state adopts the construction which has been given the statute so adopted by such other state." *Id.* at 128, 2 N.W.2d at 692.

³⁷ 101 Neb. 127, 162 N.W. 492 (1917).

³⁸ *Id.* at 128-29, 162 N.W. at 493: "From this award the defendant appeals, insisting: (1) that the removal of the beams was not within the scope of the plaintiff's employment. . . . The end of these beams projected over and obstructed the passageway, and, while there were steam-fitters near whom he might have called from their work to move the beams far enough to allow him to pass, it was perfectly natural and to be expected that in order to perform his duties he should move or attempt to move them himself."

³⁹ *Id.* at 129, 162 N.W. at 493: "They were lying upon a projecting part of the boiler, and the testimony is that beams resting upon iron, as these were, usually slide easily when pushed."

⁴⁰ *Ibid.* This definition was restated and applied in *Van Vleet v. Public Serv. Co. of York*, 111 Neb. 51, 195 N.W. 467 (1923).

ing or falling or exploding of apparatus, machinery, or tools." To hold this would unduly limit the meaning of this clause. The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly.

*Young v. Western Furniture & Mtg. Co.*⁴¹ was a similar 1917 decision. The employee was a general helper in a manufacturing plant. In cleaning and oiling two motors, a part of his ordinary duties, he was required to climb a ladder on a hot day and suffered heat prostration from which he died. Although the building was an extremely hot place in which to work, the employee was performing his normal duties in a usual way. One of the defenses raised was that heat stroke was not an accident within the compensation statute. The court, in finding an accident and allowing compensation, stated:⁴² "A stronger man might have lived, but it is enough that the industry brought about this man's death. An accident is an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected."

Recovery was also allowed in a companion case for death from heat stroke suffered by an employee while working in the same laundry in which he had been employed for fifteen years.⁴³

⁴¹ 101 Neb. 696, 164 N.W. 712 (1917).

⁴² *Id.* at 699-700, 164 N.W. at 714.

⁴³ *Kanscheit v. Garrett Laundry*, 101 Neb. 702, 164 N.W. 708 (1917). Later, the Nebraska court added a requirement that in order to be compensable, the employee must be subjected to a greater risk and hazard of heat stroke than is the public generally. *Uribe v. Woods Bros. Constr. Co.*, 124 Neb. 243, 246 N.W. 233 (1933) (laborer-car-penter working on construction of bridge over Platte River—recovery denied); *Herbert v. State*, 124 Neb. 312, 246 N.W. 454 (1933) (cement inspector working at mixing dock—recovery allowed); *Brady v. Beatrice Creamery Co.*, 127 Neb. 786, 257 N.W. 66 (1934) (cream station checker who drove over public highway on hot day—recovery denied); *McNeil v. Omaha Flour Mills Co.*, 129 Neb. 329, 261 N.W. 694 (1935) (watchman at flour mill sheltered from breeze—recovery allowed); *Hayes v. McMullen*, 128 Neb. 432, 259 N.W. 165 (1935) (road grader removing snow from public highway—recovery allowed for snow blindness); *Laudenklos v. Department of Roads & Irrigation*, 132 Neb. 234, 271 N.W. 290 (1937) (employee shoveling snow on public highway—recovery allowed for freezing of hand). It is not clear from the language of these cases whether the requirement relates to "that to which the general public is exposed," "that to which the public generally in that locality is subject," "those to which workmen generally in that locality were subjected," or the conditions "under which all of the other employees were working at the time." It is clear that none of these employees were denied recovery because the risk of heat or cold was ordinary to their employment. These cases were not a rejection of the earlier holdings that the employee had suffered an "accident" from heat stroke.

In the *Young* opinion, one of a number of cases from other jurisdictions cited by the court was the English decision, *Dotzauer v. Strand Palace Hotel, Ltd.*,⁴⁴ in which a dishwasher with peculiarly sensitive skin was held to have suffered an accident when his ordinary duties required him to wash crockery in hot water, soft soap and caustic soda for a number of hours, which caused his finger nails to come off and disabled him for four months.

In *Derr v. Kirkpatrick*,⁴⁵ recovery was allowed to a helper-clerk-repairman who was required as a part of his normal and ordinary duties to help carry a 600 pound stove over some mud. He could not point to the specific occurrence of the injury, but sometime in the process of carrying the stove and lifting it onto a truck, he suffered a severe strain, the lowered resistance from which gave rise to bronchial pneumonia and ultimately resulted in a paralysis of his hands.⁴⁶

*Skelly Oil Co. v. Gaughenbaugh*⁴⁷ was similar in holding that

They were a clarification of the requirement that the accident must arise "out of and in the course of employment." This is analogous to the employee who is caught in a sudden storm, *Gale v. Krug Park Amusement Co.*, 114 Neb. 432, 208 N.W. 739 (1926) (recovery denied), or robbed by a highwayman, *Ridenour v. Lewis*, 121 Neb. 823, 238 N.W. 745 (1931) (recovery allowed); *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N.W. 419 (1936) (recovery allowed for death by hitchhiker). The question is one of employment-connection and unless the employment has increased the employee's chances of harm over those of the public generally, the injury does not arise out of and in the course of employment. This is not inconsistent with the routine exertion approach allowing recovery for injuries resulting from the strain of ordinary work. An employment has not caused the heat to which the general public is exposed, but it has caused the risks of even routine exertion. Perhaps the advent of air conditioning methods at an economical cost has made even the risk of ordinary heat an employment risk. The "injury-by-the-elements" cases have through the years constituted a separate class of decisions in which recovery or denial of compensation has depended upon whether or not the employment has increased the risk of harm to which the general public has been exposed. Factually, the issue has been handled on an all or none basis. Either it was the heat which caused the heat stroke or the employment which caused the injury. The court has not been faced with a record which showed that heat stroke was caused by work conditions other than heat.

⁴⁴ 3 B.W.C.C. 387 (Ct. App. 1910).

⁴⁵ 106 Neb. 403, 184 N.W. 91 (1921).

⁴⁶ NEB. REV. STAT. § 48-151(4) (Reissue 1960) defines injury to include "such disease or infection as naturally results therefrom."

⁴⁷ 119 Neb. 698, 230 N.W. 688 (1930). The opinion states only that lifting the stove was "in the course of his duties." It would seem from the opinion that these were "ordinary duties."

a salesman for a gas company was allowed recovery for a hemorrhage in his right groin and leg caused by strain in lifting a stove and helping in its installation. Actually, the strain was caused in part by a pre-existing circulatory disorder resulting from the inhalation of gas fumes over a period of time. Because the strain was an accident, the employee was entitled to full compensation for the total resulting disability. The court did not have to resolve the issue of whether under prior decisions⁴⁸ the underlying disability from gassing was, itself, a compensable accident or a then noncompensable occupational disease.⁴⁹

These cases rested on the proposition that the sudden and violent producing of the injured condition was the accident. The bursting of the vessels or tearing of muscles satisfied the requirement of "by accident" whether happening by impact, exertion, or operation of the elements of nature. The only distinguishing feature was that in the exertion cases the technical occurrence of the accident took place inside the body, rather than both on the outside and the inside, as a result of the unexpected and unforeseen effect of external forces.

Throughout this initial period covering the first twenty years of the compensation statute, a number of claimants lost in the supreme court because of a failure to sustain the factual burden of proving an accident.⁵⁰ But at no time did the court require

⁴⁸ *VanVleet v. Public Serv. Co.*, 111 Neb. 51, 195 N.W. 467 (1923) (allowing recovery for repeated gassings on the basis of *Manning v. Pomerene* definition); *Blair v. Omaha Ice & Cold Storage Co.*, 102 Neb. 16, 165 N.W. 893 (1917) (no suddenness or unexpectedness producing objective symptoms where employee was required to work cleaning a very warm boiler for about a week and then put to work outside in fifteen to eighteen degree below zero weather for a week and contracted rheumatism).

⁴⁹ Neb. Laws c. 198, § 52(b), p. 601 (1913), Neb. Comp. Stat. § 48-152(b) (1929): "The said terms shall in no case be construed to include occupational disease in any form, or any contagious or infectious disease contracted during the course of employment. . . ."

⁵⁰ *Beatrice Creamery Co. v. Kizer*, 127 Neb. 34, 254 N.W. 690 (1934); *Saxton v. Sinclair Ref. Co.*, 125 Neb. 468, 250 N.W. 655 (1933); *Huffman v. Great W. Sugar Co.*, 125 Neb. 302, 250 N.W. 70 (1933); *Parsons Oil Co. v. Schlitt*, 125 Neb. 223, 249 N.W. 613 (1933); *Mullen v. City of Hastings*, 125 Neb. 172, 249 N.W. 560 (1933); *Kuhtnick v. Carey*, 124 Neb. 761, 248 N.W. 89 (1933); *De Bruler v. City of Bayard*, 124 Neb. 566, 247 N.W. 347 (1933); *Towsend v. Loeffelbein*, 123 Neb. 791, 244 N.W. 418 (1932); *Bartlett v. Eaton*, 123 Neb. 599, 243 N.W. 772 (1932); *Siedlik v. Swift & Co.*, 122 Neb. 99, 239 N.W. 466 (1931); *Kresl v. Village of Dodge*, 121 Neb. 882, 238 N.W. 752 (1931); *Omaha & Council Bluffs St. Ry. v. Johnson*, 109 Neb. 526, 191 N.W. 691 (1922). In what appears to be an effect of the depression, there was a rash of these unproven claims in the early 1930's.

that not only the injury, itself, but also the means of producing it must be accidental. The Nebraska court remained firmly committed to the English view (and the view of the large majority of American courts) that an unexpected injury is an accident under the workmen's compensation statute.

IV. THE PERIOD OF TRANSITION—1934 TO 1941

During this period, the court, without specifically considering the issue, changed the fundamental concept of accident as it had existed under the English law and under the Nebraska statute and cases for twenty years. There was no specific rejection of past cases, and no extended attempt to distinguish them. The impression from reading the cases of this period as a whole is that the new rule simply grew up in a several stage development without regard for the substantive holdings of the past decisions.

The pivotal case was *Gilkeson v. Northern Gas Eng'r Co.*,⁵¹ a 1934 decision in which the court first announced the rule that an injury by strain from exertion ordinarily incident to employment is not an accident under the statute. The employee was a fifty-one year old pipe line superintendent. He pushed and lifted an automobile which had gotten stuck going up a muddy hill and had rolled backward, to keep the automobile from going over a bank. There was no striking or slipping, but as a result of the exertion experienced in lifting and pushing the automobile, the employee suffered a heart attack which caused him total permanent disability.

The court denied recovery because the exertion which caused the injury was ordinarily incident to the occupation involved and would not have been disabling were it not for the previous infirmity of the employee. The opinion states that none of the previous cases cited by it arose merely from exertion no greater than normal to the employment involved.⁵² But the *Gilkeson* opinion cites only one of the previous exertion cases, the *Skelly Oil* case, in which there is every indication that the injury to the stove salesman in lifting the stove was a part of his ordinary duties. Certainly, it would seem that lifting a stove to assist in its installation by a salesman is equally as much a part of his ordinary duties as keeping a car from sliding over a bank on a muddy road would be to a pipe line superintendent. And the *Gilkeson* opinion simply does not cite the other earlier exertion cases.

⁵¹ 127 Neb. 124, 254 N.W. 714 (1934).

⁵² *Id.* at 128, 254 N.W. at 716.

The court relied heavily upon the Nebraska apportionment statute which then provided:⁵³

If an employee receives an injury, which, of itself, would only cause partial disability, but which, combine[d] with a previous disability, does in fact cause a total disability, the employer shall only be liable as for the partial disability, so far as the subsequent injury is concerned.

The statute was significantly amended in 1947 to provide a method of allocating the payment of compensation for subsequent injuries causing permanent total disability to a previously disabled employee between his employer and a state-maintained second injury fund.⁵⁴ The present statute does not appear to limit the conditions under which compensation is otherwise payable or the amount of the compensation, but, rather, provides merely for a method of allocating the compensation payments.⁵⁵ The cases since *Gilkeson*, however, have continued to rely on the *Gilkeson* decision without questioning its authority. Also, this statute applies only to an employee with "a previous disability."

⁵³ Neb. Laws c. 198, § 28, p. 592 (1913), Neb. Comp. Stat. § 48-128 (1929).

⁵⁴ Neb. Laws c. 174, § 1, p. 559 (1947), as amended, NEB. REV. STAT. § 48-128 (Reissue 1960): "If an employee receives an injury which of itself would cause only partial disability but which, combined with a previous disability other than one caused by disease, does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and for the additional disability the employee shall be compensated out of a special fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund."

⁵⁵ See *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952). In *Gilkeson*, the court interpreted the language of the previous statute, "would . . . cause partial disability," carried forward into the present second injury fund section, to deny compensation if the exertion alone without the pre-existing infirmity would not have caused disability. This would seem to be an irrelevant consideration as to whether some compensation is owed to the employee, although it might be relevant to determine whether the employer or a state fund should be responsible for the payments. The plain facts of the *Gilkeson* case were that the strain of pushing the automobile did in fact cause Mr. *Gilkeson* to be permanently and totally disabled. Had Mr. *Gilkeson* been fortunate enough to have had a degenerative condition in his ankle which would have caused him to slip and suffer the heart attack, he would have been compensated even though the slip alone would not have produced disability. See *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922). This rule of the *Gilkeson* case has not been restated in subsequent decisions. It would probably be impossible in an exertion or strain case to establish as a matter of medical fact that the exertion or strain would have caused disability were it not for the pre-existing infirmity.

In the sense used in this statute, Mr. Gilkeson was probably not disabled. "Disability" apparently was used in this statute as an inability to perform the required duties of the actual occupation of the employee or some substantial physical loss of a body function.⁵⁶ There is nothing in the opinion which would indicate that although Mr. Gilkeson may have had prior heart trouble, had his teeth removed and had other maladies, he was not able to perform fully his normal duties on a day to day basis.

In 1937, in *Dymak v. Haskins Bros.*,⁵⁷ the court appeared once again to permit recovery for strain resulting from performance of the normal duties of the employee. A female wrapping machine operator in a soap factory wrenched her back in attempting to turn a fly wheel on a machine which would not start. She had a congenital defect of the back, which made her spine weaker than normal and more susceptible to strain than a normal spine. The court permitted a recovery without discussing the ordinary exertion rules and with the statement that recovery should be allowed even though the same injury would not have occurred in a sound person. The *Gilkeson* case was distinguished on the basis that the court had held that Mr. Gilkeson had a previous disability and that factually the previous disability

⁵⁶ In a number of cases, the Nebraska Supreme Court has allowed compensation benefits based upon the total resulting disability in spite of a pre-existing infirmity which would seem to have constituted a compensable disability had it arisen by accident arising out of and in the course of employment. The courts often award compensation even though the employee retains the same job or secures a more remunerative one. For purposes of computing benefits, disability is measured in terms of "earning capacity" rather than actual earnings. Many decisions refer to what would appear to have been a "disability" had compensation been sought therefor as a "condition" or "impairment" unless it actually interferes with the performance of the employee's actual work. A serious physical loss of a body function would probably be afforded similar treatment. See, e.g., *Turner v. Beatrice Foods Co.*, 165 Neb. 338, 85 N.W.2d 721 (1957) (bad back requiring use of a low back brace); *Knudsen v. McNeely*, 159 Neb. 227, 66 N.W.2d 412 (1954) (previous fracture of arm immobilized by metal bone plate and loops of wire, which ached in damp weather); *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 891 (1948) (several past infectious diseases and injuries and arthritic condition in spine); *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N.W. 688 (1930) (noncompensable occupational disease); *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922) (syphilis). But cf. *Towner v. Western Contracting Corp.*, 164 Neb. 235, 82 N.W.2d 253 (1957) (herniated disc in back treated as a "condition" rather than a "disability" for benefit purposes).

⁵⁷ 132 Neb. 308, 271 N.W. 860 (1937).

ity was not increased by the strain.⁵⁸ Miss Dymak, on the other hand, had worked for the same employer for eleven years prior to the accident and had never suffered from a strain or injury in her back. Thus, Miss Dymak did not have a "previous disability." From the standpoint of the actual physical health of the employee and the relationship of the employee to the employer, there is little to distinguish *Dymak* from *Gilkeson*. It appears that in both cases the employee was able to accomplish his or her assigned work without any limitation on the effectiveness of performance caused by the pre-existing infirmity. Neither had a functional loss of use of any part of the body. It does not seem clear why Mr. Gilkeson was considered as having a previous disability, but Miss Dymak was not.

The next year, in *Shamp v. Landy Clark Co.*,⁵⁹ the court denied recovery to the widow of a forty-nine year old coal hauler who was found dying of a heart attack in the back of the truck of coal he was unloading on his second day of work for the employer. The holding might have been placed solely on the ground that the plaintiff had not sustained the burden of proof of causal connection between the employment and death.⁶⁰

⁵⁸ *Id.* at 311, 271 N.W. at 862.

⁵⁹ 134 Neb. 73, 277 N.W. 802 (1938).

⁶⁰ The court applied the rule that where an employee dies under mysterious circumstances during his work, the burden of proving that the death was an accident arising out of the employment rests upon the claimant for compensation. See *Mullen v. City of Hastings*, 125 Neb. 172, 249 N.W. 560 (1933). Recoveries had recently been denied to an employee who could not prove with reasonable certainty that trauma could have caused an infected condition in his hands, and to the dependents of a worker who died of hernia who could not show any time or place in the employment where it might have occurred. See *Skochdopole v. State*, 133 Neb. 440, 275 N.W. 665 (1937); *Orchard & Wilhelm Co. v. Petersen*, 127 Neb. 476, 256 N.W. 37 (1934). The court also indicated that Mr. Shamp's heart attack was not an accident because there was no evidence of violence. But the undisputed evidence of death by heart attack should have constituted violence within the meaning of the statute. The court relied upon a previous holding that where a worker slipped into a river and allegedly contracted a cold which developed into pneumonia, he had not shown that the accident occurred suddenly and violently. *Lange v. Gage County Elec. Co.*, 133 Neb. 388, 275 N.W. 462 (1937). See *Blair v. Omaha Ice & Cold Storage Co.*, 102 Neb. 16, 165 N.W. 893 (1917). Cf. *Chatt v. Massman Constr. Co.*, 138 Neb. 288, 293 N.W. 105 (1940) (recovery allowed in a similar situation where worker died of a chill from falling in a river, but had also injured and bruised his leg). And the court later held that a mental breakdown may happen "violently" within the meaning of the accident definition, even though it may not involve "violence to the physical struc-

But the court additionally stated that an injury caused by the strain of ordinary exertion is not an accident under the statute:⁶¹

There is no evidence in the record to indicate that Ole Shamp did not come to his death during ordinary exertion required of him to perform his work in the ordinary manner. The rule, then, to be applied is that an injury or death is not compensable as an accident under the compensation act when sustained during the ordinary exertion required to perform the employee's duties in the ordinary and normal manner. *Gilkeson v. Northern Gas Engineering Co.* . . .

Certainly if one is to interpret the language in the *Dymak* opinion as indicating that the *Gilkeson* case held merely that Mr. Gilkeson's pushing the automobile did not in fact cause the heart attack,⁶² the distinction was lost in the *Shamp* opinion. *Shamp* seems to indicate clearly that even though Mr. Shamp's work were shown to have in fact caused the heart attack, the injury would not be compensable because it arose out of ordinary exertion.

Three years later, the shift became complete in *Rose v. City of Fairmont*.⁶³ The plaintiff was a fifty year old city water and light commissioner, a position he had held for twelve years. The city owned a Model "T" which had a starter, but the starter was not used because it ran down the battery. On a cold morning, the commissioner and a helper had to take turns cranking the motor to get it started. From this exertion as a part of his ordinary duties, the plaintiff suffered a heart attack. The court denied recovery, on what has since become a black letter axiom under the Nebraska compensation statute:⁶⁴ "Mere exertion which is not greater than ordinarily incident to employment, but which combines with a preexisting disease to produce disability is not a compensable 'accidental injury.'" The opinion of the court relies upon *Gilkeson* and *Shamp*. It states that "cases cited by plaintiff, such as *Manning v. Pomerene* . . . can each be distinguished from the case at bar."⁶⁵ *Manning v. Pomerene*⁶⁶ is the only exertion case in the list cited. And no explanation is

ture of the body" as that phrase is used in the definition of "injury." *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942).

⁶¹ *Shamp v. Landy Clark Co.*, 134 Neb. 73, 81, 277 N.W. 802, 807 (1938).

⁶² See note 58 *supra*.

⁶³ 140 Neb. 550, 300 N.W. 574 (1941).

⁶⁴ *Id.* at 555, 300 N.W. at 577.

⁶⁵ *Id.* at 554-55, 300 N.W. at 576.

⁶⁶ 101 Neb. 127, 162 N.W. 492 (1917).

offered in the opinion as to just why *Manning* is distinguishable. *Manning*, it will be recalled, had specifically held that the bursting of the blood vessels in the employee's brain or stomach as he pushed two "I" beams in the ordinary performance of his duties constituted an accident under the compensation statute. Factually, the *Rose* case, which involved starting a cold engine, is virtually identical to the English decision in *Hensey v. White*⁶⁷ which had been overruled by *Fenton v. Thorley & Co.*⁶⁸ in 1903. The practical effect of the *Rose* opinion would seem to have been that all of the early Nebraska decisions which had held that an unexpected injury was an accident were now overruled, even though the court had done no more than merely to announce a new rule of law.

The *Rose* opinion also makes it clear that any slipping or falling in connection with ordinary work or ordinary exertion may be sufficient to make the entire disability an injury by accident. The court approved and distinguished its recent decision in *Schirmer v. Cedar County Farmers Tel. Co.*⁶⁹ The plaintiff was one of defendant's linemen. He had climbed a telephone pole and fastened his spur onto the pole. The spur slipped a few inches and the plaintiff caught himself with his left arm. As a result of the slipping, or the slipping plus the exertion of catching himself and the exertion of climbing the pole, the plaintiff suffered a heart attack. The court allowed recovery on the basis that the work connected aggravation of a pre-existing physical infirmity by accident was compensable. The fact that there was a slipping, however slight, made the injury an accident even though it arose out of the employee's ordinary duties, and even though it may have combined both with the pre-existing heart condition of the employee and the routine exertion of climbing the telephone pole. This was consistent with the previous cases which had held that an employee is entitled to workmen's compensation for his total resulting disability where a pre-existing disease or other condition is aggravated by accident. For example, recovery had been granted to employees with syphilis for slight scrapes on the leg or back which later ulcerated and caused disability, even though the scrapes might have gone virtually unnoticed by an ordinary person.⁷⁰ And a person

⁶⁷ [1900] 1 Q.B. 481.

⁶⁸ [1903] A.C. 433.

⁶⁹ 139 Neb. 182, 296 N.W. 875 (1941).

⁷⁰ *Miller v. Central Coal & Coke Co.*, 123 Neb. 793, 244 N.W. 401 (1932); *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922). See Annot., 28 A.L.R. 204 (1924).

with an underlying mental disorder had been held to be entitled to compensation for the disability caused by a very minor electric shock.⁷¹

Judge Carter dissented in the *Schirmer* case on the basis that "[i]t is more likely that plaintiff's heart condition caused what he chooses to call an accident than that the alleged trauma caused his heart ailment."⁷² This may have been true as a matter of fact, just as the syphilis or mental disorder may have had much more to do with those disabilities than the slight scrapes or electric shocks. Judge Carter's position in this regard is quite similar to some of the recent tort decisions of other states which have been unwilling to push liability for aggravation to the point where a third party is liable for a mere triggering of a pre-existing infirmity which could be activated by a large number of variable events.⁷³ But the crucial fact in *Schirmer* is that it was the employment which actually produced the disability, and not a natural progression of the physical disorder. The policy of the workmen's compensation law to place the costs of work-connected injuries on the economic product involved is considerably broader than the tort liability of third parties. For these reasons, compensation was, and should have been allowed. It would seem, further, that compensation should be allowed on the

⁷¹ *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N.W. 449 (1929). See *Lee v. Lincoln Cleaning & Dye Works*, 145 Neb. 124, 15 N.W.2d 330 (1944).

⁷² *Schirmer v. Cedar County Farmers Tel. Co.*, 139 Neb. 182, 187, 296 N.W. 875, 878 (1941).

⁷³ Compare *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961) (4-3 decision) (tort damages awarded for "severe emotional and neurological disturbances" to child improperly placed in chair lift) with *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960) (no tort liability for emotional illness set off by minor automobile accident causing imaginary fright of killing child). See Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943). Most of the recent compensation cases would reach an opposite result. Compare *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960) (compensation allowed for mental breakdown caused by production line stress), and *Olson v. F. I. Crane Lumber Co.*, 107 N.W.2d 223 (Minn. 1961) (compensation allowed for suicide from depression over heart attack caused by excessive heat and humidity at work), with *Chernin v. Progress Serv. Co.*, 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (3d Dep't 1959) (compensation denied for emotional breakdown of taxicab driver during police investigation of minor automobile accident). See Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129 (1961). See also *McMillan v. Western Pac. R.R.*, 54 Cal. 2d 841, 357 P.2d 449 (1960) (emotional collapse from duties negligently required by employer recoverable under Federal Employers' Liability Act).

same basis whether the injury comes about from slipping, a scrape, a shock, or exertion.

Following his dissent in *Schirmer*, Judge Carter concurred in a separate opinion in the *Rose* case.⁷⁴ His position again was that the bad heart was a more significant factor in causing the resulting disability than was cranking the Model "T." But this position, while it presents a logically consistent view, is not in keeping with the purpose and intent of the workmen's compensation statute to compensate the employee for those disabilities which the employment has in fact brought about. Were it not for the slipping in *Schirmer*, the employee would not have had his heart attack—at least not at that time, and perhaps not ever. The same is true in the case of Mr. Rose, even though he was simply cranking a car and did not slip.

V. THE CURRENT PERIOD—1941 TO 1961

Throughout this period, the rule has been applied consistently that disability from exertion no greater than that normally incident to the employment of the injured employee does not constitute an accident under the workmen's compensation statute. For example, compensation was denied to a fireman with a pre-existing arthritic and heart condition for disability from physical exertion in handling a fire hose and exposure to smoke and fumes from fighting a fire for about three hours in a smoke-filled basement which at the time caused repeated vomiting by the firemen;⁷⁵ to a fifty-one year old cabinet maker and refinisher of furniture for ruptured vessels causing blindness in one eye from lifting and pushing a fifty pound spray bench endwise through a door;⁷⁶ to a forty-five year old tire and battery man for a fatal heart attack from repeated attempts to start a small gasoline engine with a starter rope;⁷⁷ to a carpenter for a hernia from pulling twenty foot long sheathing boards to the

⁷⁴ *Rose v. City of Fairmont*, 140 Neb. 550, 556, 300 N.W. 574, 577 (1941): "In both cases coronary thrombosis was the cause of the purported accident and the resulting disability. Instead of an accident causing the disability in each of these cases, the diseased condition of the claimant caused that which was described as an accident."

⁷⁵ *Brown v. City of Omaha*, 141 Neb. 587, 4 N.W.2d 564 (1942). See *Eschenbrenner v. Employers Mut. Cas. Co.*, 165 Neb. 32, 84 N.W.2d 169 (1957) (sixty-two year old police chief with heart ailment suffered heart attack after subduing by use of various methods including tear gas an armed insane man who was staked out in a house and holding children as hostages).

⁷⁶ *Roccaforte v. State Furniture Co.*, 142 Neb. 768, 7 N.W.2d 656 (1943).

⁷⁷ *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945).

roof top of a house;⁷⁸ to a fifty year old lady rocket packer for injuries to her shoulder and arm from suffering repeated jars and strains in using her body to stop and release boxes on a conveyor belt;⁷⁹ to a shader (classifier) of tile in a tile manufacturing plant for strain to his upper spine from lifting tiles and putting them on a conveyor belt;⁸⁰ and to a twenty-six year old garbage collector who suffered injuries in his neck which paralyzed him for life from lifting and dumping a fifty or sixty pound, thirty gallon, barrel of garbage into a truck.⁸¹

At the other extreme, an employee injured by an external "event" has consistently been held to have been injured by accident, regardless of whether or not the event is incident to his ordinary employment. If the employee can show that the injury was caused by a slip, trip, stumble, fall, bump, or some comparable label, he has suffered an accident.⁸²

In fact, an employee may be entitled to compensation for what might otherwise be called "mere exertion, which is no greater than that ordinarily incident to the employment" where there is some sort of a slipping which has caused the employee to exert himself. For example, compensation has been allowed to a warehouse employee with a kidney ailment, whose duties included dumping sixty pound sacks of empty coffee cans onto

⁷⁸ *Muff v. Brainard*, 150 Neb. 650, 35 N.W.2d 597 (1949). See *Foster v. Atlas Lumber Co.*, 155 Neb. 129, 50 N.W.2d 637 (1952), noted in 31 NEB. L. REV. 632 (1952) (sixty-two year old lumber yard manager sustained a hernia from carrying a fifty pound paint carton 150 feet).

⁷⁹ *Murray v. National Gypsum Co.*, 160 Neb. 463, 70 N.W.2d 394 (1955). See *Hladky v. Omaha Body & Equip. Co.*, 172 Neb. 197, 109 N.W.2d 111 (1961) (sixty-seven year old common laborer previously engaged in grinding corners on truck bodies in assembly plant developed a paralysis from operating a small airpowered hammer riveting gun and bucking rivets, who, although he had never done this work before, had complained that the work was too much for him, and had been assured by his boss that the work would be good for his rheumatism).

⁸⁰ *Jones v. Yankee Hill Brick Mfg. Co.*, 161 Neb. 404, 73 N.W.2d 394 (1955).

⁸¹ *Feagins v. Carver*, 162 Neb. 116, 75 N.W.2d 379 (1956). See *Carranza v. Payne-Larson Furniture Co.*, 165 Neb. 352, 85 N.W.2d 694 (1957) (twenty-six year old common laborer and warehouseman ruptured disc in his back from helping lift a 250 pound Serta bed); *Schanhols v. Scottsbluff Bean & Elevator Co.*, 168 Neb. 626, 97 N.W.2d 220 (1959) (employee of elevator engaged in processing beans suffered a back strain from hurriedly sweeping dirt from a clogged conveyor and shoveling beans which leaked or fell from the conveyor).

⁸² See, e.g., *Plambeck v. Natkin & Co.*, 171 Neb. 774, 107 N.W.2d 734 (1961) (steamfitter lifting heavy pipe slipped and strained his back).

a conveyor, who suffered a sprained back in trying to grab a broken or torn sack to keep it from falling apart;⁸³ to a mechanic-fitter who suffered a strained back due to the slip or uneven lifting of a fellow employee while helping lift a stove which caused a wobble, lurch or jerk;⁸⁴ and to a twenty-one year old grocery clerk who suffered a strained back in attempting to retain control of a falling carton which had slipped from his hands as he was stacking it.⁸⁵

In two cases, the court has held that an employee's injury was due at least in part to unusual exertion. *Anderson v. Cowger*,⁸⁶ in 1954, involved a heart attack suffered by a forty-one year old salesman-warehouseman for a wholesale grocery business. While out on his route, he was driving blind through a heavy snowstorm and ran into a snowdrift at about twenty-five miles per hour without being able to apply his brakes. The sudden stop jarred his arms and shoulders. He stayed in the car for five minutes, crawled out a window, and then walked thirty to fifty yards through knee deep, blowing snow to a highway department snowplow. He rode in the cab of the snowplow for fifteen to twenty minutes, during which he suffered cramps. After arriving at a filling station, he sustained the heart attack.

The court noted that the exertion required of the employee was actually no greater than his normal duties of lifting and stacking 100 pound sacks.⁸⁷ The opinion restated the rule that "mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident," but distinguished its application to the case:⁸⁸

But here the accident did not consist solely of appellee's exertion in wading through the snow. This had been preceded by the jarring he received when his car came to a sudden stop. There was also the additional fact that he was walking through a snowstorm in freezing weather with the wind blowing up to 50 miles an hour.

The combination of all these elements was said to make the exertion greater than that ordinarily incident to the employee's

⁸³ *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950).

⁸⁴ *Gilbert v. Metropolitan Util. Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953). It is not clear whether a "wobbling, lurching or jerking" without any "slipping" is an accident. See *Carranza v. Payne-Larson Furniture Co.*, 165 Neb. 352, 85 N.W.2d 694 (1957).

⁸⁵ *Pittenger v. Safeway Stores, Inc.*, 166 Neb. 858, 91 N.W.2d 31 (1958).

⁸⁶ 158 Neb. 772, 65 N.W.2d 51 (1954).

⁸⁷ *Id.* at 777, 65 N.W.2d at 57.

⁸⁸ *Id.* at 778, 65 N.W.2d at 57.

employment,⁸⁹ and to make the case more comparable to *Skelly Oil Co. v. Gaughenbaugh*⁹⁰ and *Manning v. Pomerene*.⁹¹ It is submitted that *Skelly Oil* and *Manning*, discussed above, would have treated the unexpected and unforeseen heart attack caused by ordinary exertion of the employment as an accident, whether or not there was an external jarring or a fifty mile per hour wind. *Anderson v. Cowger* also rested its decision in part on the fact that the injury was contributed to by a greater exposure to the elements than that of the general public in the community.⁹²

In 1960, the court stated that a heart attack of a fifty year old general maintenance man and orderly in a small hospital may have been caused, at least in part, by unusual exertion. In *Knaggs v. City of Lexington*,⁹³ the employee's normal duties included moving 300 to 400 pound oxygen tanks, lifting patients into and out of bed, and whatever maintenance work was required around the hospital. On the day of the heart attack, he was called upon to fix a frequently clogged disposal unit. In the process of plunging the unit, his feet slipped on the metal edge of the sink and he fell on the lower part of his back or buttocks. He had some pain at this time. Later, he was painting a floor which required him to move a 500 pound refrigerator and a 1,500 pound deep freeze loaded with groceries. By pushing at alternate ends of the deep freeze for about twenty or twenty-five minutes, he succeeded in moving it four feet out from the wall so that he could paint under it. As he moved the deep freeze and while he painted, the pain continued to increase and finally he went to a doctor. The medical opinions of the two doctors for the employee were that the fall plus the extreme exertion of moving the heavy equipment played a large part in causing the heart attack.⁹⁴ After detailing this medical evidence, the court's opinion stated:⁹⁵

In this respect we mention the circumstances of appellee moving the fully-loaded deep freeze as not being exertion of a character as would ordinarily be incident to his employment. The

⁸⁹ *Id.* at 778, 65 N.W.2d at 57: "Considering these other elements, we think the exertion here was greater than that ordinarily incident to appellee's employment. . . ."

⁹⁰ 119 Neb. 698, 230 N.W. 688 (1930). See note 47 *supra*.

⁹¹ 101 Neb. 127, 162 N.W. 492 (1917). See note 38 *supra*.

⁹² *Anderson v. Cowger*, 158 Neb. 772, 778, 780-81, 65 N.W.2d 51, 57, 58 (1954).

⁹³ 171 Neb. 135, 105 N.W.2d 727 (1960).

⁹⁴ *Id.* at 143-45, 105 N.W.2d at 733-34.

⁹⁵ *Id.* at 145, 105 N.W.2d at 734.

evidence shows it required extreme overexertion. We have come to the conclusion, as did the district court, that appellee suffered a compensable injury due to an accident arising out of and in the course of his employment.

It is not clear whether the opinion relied alone upon the overexertion of pushing the deep freeze as an accident, or upon the combination of the fall plus the overexertion suggested in the medical testimony. It may be significant that although both impact and exertion are shown by the facts, the court did not rely specifically upon the reasoning of *Anderson v. Cowger* that impact plus extreme exertion equals overexertion. *Anderson v. Cowger* is cited in the *Knaggs* opinion, but not in this phase of the case. The court's reasoning in *Knaggs* seems to be focused primarily on exertion rather than exertion following a fall.⁹⁶

It is unlikely that *Knaggs* represents any serious departure from the other recent cases. It gave full approval to all of the ordinary exertion rules. It labels itself as an *ad hoc* decision which must stand on its own facts.⁹⁷ The facts in the opinion, especially the medical testimony, clearly show a fall followed by extreme exertion. Although *Manning v. Pomerene*⁹⁸ was argued to the court as being "on all fours with the case at bar,"⁹⁹ it was not relied upon in this aspect of the court's opinion.

By the same token, *Knaggs* may not be dismissed as simply an extreme application of the impact doctrine that any external force, however slight, which contributes to an injury constitutes an accident under the compensation statute. The reasoning of the court did not specifically rely upon the fall to support its conclusion that the employee had sustained an accident.

⁹⁶ Judge Carter dissented on the ground that the employee had not shown the "causal connection between the accident and the coronary occlusion." His opinion seems to treat the fall as the accident, rather than considering the fall plus the exertion, the exertion alone, or the heart attack alone, as the accident. Judge Carter's opinion favored the testimony of the three doctors testifying for the defendant, and contended that the opinions of the employee's two doctors were, by their own admissions, mere possibilities and conjecture. Judge Carter's dissenting opinion does seem to infer that the majority of the court was not deciding the case on the basis that the exertion of pushing the 1,500 pound deep freeze would, by itself, have been a compensable accident were it not for the presence of the fall.

⁹⁷ *Id.* at 145-46, 105 N.W.2d at 734.

⁹⁸ 101 Neb. 127, 162 N.W. 492 (1917).

⁹⁹ Brief for Appellee, pp. 56-57, *Knaggs v. City of Lexington*, 171 Neb. 135, 105 N.W.2d 727 (1960).

Perhaps *Knaggs* should simply be dismissed as indicating that moving a 1,500 pound deep freeze loaded with groceries constitutes unusual exertion for an employee who has never had to move the deep freeze before—at least, if it follows a hard fall and the exertion of routinely moving a 500 pound refrigerator. This interpretation is fortified by the 1961 decision in *Hladky v. Omaha Body and Equip. Co.*,¹⁰⁰ which reaches an opposite result, but does not refer to *Knaggs*. In *Hladky*, the conventional “mere exertion” rule was applied to deny compensation to the common laborer who had never before run an airpowered hammer riveting gun. He complained to his boss that the airhammer was shaking him up, but was told by the boss that it would be good for his rheumatism. The jarring of the airhammer might have been considered as an external force comparable to a slip, trip or fall. The court held that even though the employee may have suffered a paralysis causing him permanent disability from running the riveting gun,¹⁰¹ it was not compensable because it was caused by “mere exertion, which is no greater than that ordinarily incident to the employment.”

VI. AN EVALUATION OF THE CURRENT NEBRASKA RULES

A. The Nebraska statutes do not explicitly state whether a compensable injury must occur from an accidental “cause” or whether an unexpected or unforeseen injury is itself an accident. At the crux of the problem is the statutory phrase defining “accident” that it shall “be construed to mean an unexpected or unforeseen event.” The court interprets this to require some sort of an “external” event, a slipping or fall, or work requirements which are unusually strenuous compared with the ordinary duties of the particular employment. There is no reason why the statute does not contemplate merely that an internal body failure of the worker is an “unexpected or unforeseen event” which constitutes an “accident” if the other requirements of “accident” are also met.

If the language of this statute is regarded as being ambiguous, then normally the court would adopt a liberal interpretation of the statute to provide compensation for workers whose

¹⁰⁰ 172 Neb. 197, 109 N.W.2d 111 (1961).

¹⁰¹ The court did not specifically decide whether or not the condition was caused by the work. It held that in any event the injury was the product of ordinary exertion and, therefore, not caused by accident. *Id.* at 203, 109 N.W.2d at 114-15.

employment has caused them injury.¹⁰² But read in the background of its historical development, the statute does not appear to be ambiguous. The phrase "by accident" had a fixed meaning under the English decisions interpreting the English legislation from which the American requirements were copied. These cases had determined that an injury from the strain or exertion of performing normal employment duties constituted an accident.¹⁰³ The phrase "unexpected or unforeseen event" would seem to be nothing more than a codification of the judicial language of the House of Lords explaining that such an injury from ordinary work was a compensable injury "by accident."¹⁰⁴ The Nebraska statutory definition did add at least one requirement, "happening suddenly and violently," which may not have been a part of the English definition. From this, it is significant that Nebraska did not require that the "cause" of the injury, rather than the "result," be "by accident," although that issue had also been litigated in the English cases.

The requirement of an unexpected or unforeseen event appears in the definition of all seven state statutes which define "accident."¹⁰⁵ The courts of Alabama,¹⁰⁶ Florida,¹⁰⁷ Idaho,¹⁰⁸

¹⁰² See, e.g., *Haler v. Gering Bean Co.*, 163 Neb. 748, 81 N.W.2d 152 (1957); *Ludwickson v. Central States Elec. Co.*, 135 Neb. 371, 281 N.W. 603 (1938); *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938); *Speas v. Boone County*, 119 Neb. 59, 227 N.W. 87 (1929). This rule is stated extremely often in the decisions, even in exertion cases. See Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 4 (1961). Cf. *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 615-16, 111 N.W.2d 368, 371 (1961): "The plaintiff calls our attention to the fact that it has long been the policy of this state to give a liberal construction to the workmen's compensation law so that its beneficial purposes might not be thwarted by a technical refinement of interpretation. This is still the policy. However, it has no application in the instant case. . . . To hold that a sidewalk, which is a part of the street and which is beyond the defendant's property line, is a part of the defendant's premises as that term is used in the Workmen's Compensation Act, would not be interpretation but legislation. It is not the function of the court to create a liability where the law creates none."

¹⁰³ See notes 16 and 21 *supra*.

¹⁰⁴ See notes 19 to 21 and 29 *supra*.

¹⁰⁵ See note 28 *supra*.

¹⁰⁶ *Massey v. United States Steel Corp.*, 264 Ala. 227, 86 So. 2d 375 (1955).

¹⁰⁷ *Gray v. Employers Mut. Liab. Ins. Co.*, 64 So. 2d 650 (Fla. 1952).

¹⁰⁸ *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976 (1957).

and Louisiana¹⁰⁹ all construe this language to require only an unexpected injury, whether or not the work causing the injury is "ordinary" for the employee. Alabama does this in spite of additional statutory language referring to "accidental means."¹¹⁰ Only Missouri and Nebraska refuse compensation for exertion or strain resulting from performing the normal duties of employment, although Missouri seems more liberal than Nebraska in holding that a specific activity involves extraordinary exertion.¹¹¹ Nevada has not yet ruled specifically on the issue and may lean toward the Missouri-Nebraska cases.¹¹²

B. The Nebraska "usual exertion" rules have in effect unduly extended aspects of assumption of risk into the compensation system. One of the purposes of workmen's compensation is to require the economic product involved to bear as a cost of production the blood of workmen injured in the production. This concept is that the consumers of these products, especially where the employment is hazardous or strenuous, should be called upon to pay for a portion of the physical harm caused to the employees producing the item.¹¹³ Because of the benefit computa-

¹⁰⁹ *Hemphill v. Tremont Lumber Co.*, 209 La. 885, 25 So. 2d 625 (1946); *Nickelberry v. Ritchie Grocer Co.*, 196 La. 1011, 200 So. 330 (1941). See also *Talbot v. Trinity Universal Ins. Co.*, 99 So. 2d 811 (La. Ct. App. 1957).

¹¹⁰ ALA. CODE tit. 26, § 262 (1958); *Massey v. United States Steel Corp.*, 264 Ala. 227, 86 So. 2d 375 (1955).

¹¹¹ See, e.g., *Crow v. Missouri Implement Tractor Co.*, 307 S.W.2d 401 (Mo. Sup. Ct. 1957); *State v. Blair*, 352 Mo. 1091, 180 S.W.2d 737 (1944). The cases hold exertion to be unusual without the presence of impact.

¹¹² See *Smith v. Garside*, 355 P.2d 849 (Nev. 1960). During the time Minnesota had a similar statute, the court nominally stated ordinary exertion rules, especially in heart cases, but found overexertion on exceedingly slim facts. See 1 LARSON, WORKMEN'S COMPENSATION LAW 521-22, 530 (1952).

¹¹³ *Kaplan v. Gaskill*, 108 Neb. 455, 460, 187 N.W. 943, 945 (1922): "The compensation act was not intended to impose a charge upon the individual employer, but upon the industry or business or vocation in which he was engaged, on the theory that the industry could bear the loss resulting from personal injuries to its employees, and that the burden could be passed on to the patrons of that industry by charging up such losses to operating expense."; *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 423, 217 N.W. 952, 954 (1928): "It is generally understood that an outstanding purpose of the workmen's compensation law was to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." See PROSSER, TORTS § 69, at 383 (2d ed. 1955): "The theory under-

tions, the workmen's compensation system is geared to pay only a portion of the employee's resulting loss of earning power from disability. Nebraska pays medical bills in full,¹¹⁴ but the ratio of average weekly compensation benefits to average weekly wages in Nebraska is only forty-nine per cent.¹¹⁵ Thus, the employees in Nebraska are left by the underlying compensation structure to assume fifty-one per cent of the disability loss from work connected injury. To this extent, there is an assumption of risk even though the statute has abolished the defenses of assumption of risk, fellow servant rule, and contributory negligence unless the accident is caused by the employee's wilful negligence.¹¹⁶

In practice, the medical costs and forty-nine per cent compensation for disability placed by the compensation system on employers may or may not be shifted to the consumer depending upon other production costs of the business.¹¹⁷ The competi-

lying the workmen's compensation acts never has been stated better than in the old campaign slogan [allegedly attributed to Lloyd George], 'the cost of the product should bear the blood of the workman.' The accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the customer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer." See also AARON, *THE EMPLOYMENT RELATION AND THE LAW* 183-84 (1957).

¹¹⁴ NEB. REV. STAT. § 48-120 (Reissue 1960). But the statute does not provide for prosthetic devices, palliatives, retraining, or other rehabilitation.

¹¹⁵ U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. NO. 212, *STATE WORKMEN'S COMPENSATION LAWS: A COMPARISON OF MAJOR PROVISIONS WITH RECOMMENDED STANDARDS* (1959). The recommended standard is a benefit level equal to at least 66% of the state's average weekly wage.

¹¹⁶ NEB. REV. STAT. §§ 48-102, -109, -151(7) (Reissue 1960).

¹¹⁷ Cf. Witte, *The Theory of Workmen's Compensation*, 20 AM. LAB. LEG. REV. 411, 414-15 (1930): "Varying costs do not necessarily mean that the payments made by employers for compensation or compensation insurance are not shifted to the consumers. Economic theory teaches us that, both under conditions of competition and under conditions of monopoly, these costs *may* be shifted, in whole or in part, depending upon the elasticity of demand and other factors. It does not assert, however, that the entire cost is necessarily or usually shifted, nor does it answer what part is passed on to the consumers in any concrete case. Similarly, the extent to which

tive system would allocate these costs between the consumers, shareholders or business owners, managers, employees, suppliers, and others interested in the economic enterprise. What the ordinary exertion rules do is to require the employees, themselves, to assume the additional risks of the medical bills and disability losses which would otherwise be treated as a cost of production.

The "usual exertion" rules permit employers engaged in the most strenuous sorts of occupations, whose consumers should theoretically pay the highest costs of production for injuries to the workers, to shift a portion of the risk of harm back to the individual workers, themselves. To the extent that the workers may be injured by strain or exertion, the individual workers, themselves, and not the product, are forced to pay for their own blood. If the employment calls upon an employee to lift 500 pound refrigerators as a part of his ordinary employment, then the employee, and not the product, must bear the risk of physical strain from the lifting. On the other hand, an employee who is not required to lift may be compensated on an extraordinary exertion principle for injuries from lifting a considerably lesser weight. Supposedly, the employer who called upon his employees to lift 500 pounds every day, and the consumers of those products, should be required to bear a greater cost for physical harm caused to employees from the strain of lifting 500 pounds than employers and consumers requiring no lifting. But the result is exactly reversed in Nebraska. The individual employees of the employer requiring strenuous work, and not the employer or his consumers, are forced to bear the risks of the physical harm from the exertion.

The Nebraska cases have not required that the employee have merely the physical health of an average worker. They have not required the worker to assume merely the risks of some

compensation costs are shifted is not statistically measurable. It is probable that a part of the costs are normally shifted; but all employers, with their greatly varying costs, certainly do not escape painless. . . . Workmen's compensation does not place the cost of accidents upon industry, but provides for a sharing of the resulting economic loss between employers and employees on a pre-determined basis, without reference to fault, under a plan designed to insure prompt and certain recovery, at minimum expenses. Its justification is, not that the consumers in the end pay the bill, but that workmen's compensation reduces the economic loss resulting from industrial accidents to a minimum. This is the principle of 'the least social cost,' a phrase coined by the late E. H. Downey in his book on workmen's compensation—the philosophy of eliminating industrial waste, which President Hoover and his fellow engineers have made familiar in recent years."

sort of a mythical employment. The practical effect of the "usual exertion" rules has been to require the employees to assume the risks of internal body injury from virtually anything they may be doing for their employers. No Nebraska decision since *Dymak* in 1937 has allowed recovery for any form of exertion or strain, however "extraordinary," without some additional facts also being set out in the opinion showing an impact or slipping.

Under these cases, exertion is considered to be ordinary even though the employee has told his employer the work was too much for him, and has never done the specific type of work before¹¹⁸ even though the employee faced "emergency" circumstances if he was hired, in part, to face emergencies,¹¹⁹ and perhaps even though there are slight physical impacts if the impacts are so numerous and frequent as not to be unexpected and unforeseen.¹²⁰ Pursuing this reasoning to its extreme, an employer would not be liable for compensation for forcing an employee to do work which the employer knew would cause harm to the employee, if that work were part of the employee's ordinary duties.¹²¹

Perhaps the most extreme example of requiring an employee to assume the risks of his employment is *Eschenbrenner v. Employers Mut. Cas. Co.*¹²² This case recites a situation in which a police chief dramatically captured an armed insane man, but was denied compensation for a heart attack, which the court seemed tacitly to assume was caused by the struggle, because police chiefs in small Nebraska cities are supposed to capture insane people. The chief tried to persuade the man to surrender himself or to release children whom he was holding as hostages, was confronted with a gun held to his stomach by the insane

¹¹⁸ *Hladky v. Omaha Body & Equip. Co.*, 172 Neb. 197, 109 N.W.2d 111 (1961).

¹¹⁹ *Eschenbrenner v. Employers Mut. Cas. Co.*, 165 Neb. 32, 84 N.W.2d 169 (1957); *Brown v. City of Omaha*, 141 Neb. 587, 4 N.W.2d 564 (1942). The overwhelming weight of authority in other jurisdictions allows recovery in this situation. See Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 9 (1961).

¹²⁰ *Murray v. National Gypsum Co.*, 160 Neb. 463, 70 N.W.2d 394 (1955).

¹²¹ Cf. *Gamble v. Gamble*, 171 Neb. 826, 108 N.W.2d 92 (1961) (employee assumed risks of riding horse over rough, icy terrain to which his employer, a ranch owner not covered by workmen's compensation, had negligently exposed him after his objection to attempting the work because of the dangerous conditions).

¹²² 165 Neb. 32, 84 N.W.2d 169 (1957).

man, was released, engaged in a two hour battle in which shots were fired, tried to kick in a door, crashed in a window through which tear gas was shot into the house, breathed some of the tear gas, helped rescue the children held as hostages, got the draw on the insane man as he left the house, and disarmed and subdued the man. He then walked to a shed, vomited, slumped to the ground and died several hours later of a heart attack. The court, in applying the ordinary exertion rule, stated:¹²³

That was the type of job he had. On occasion emotional stress and strain and physical exertion are involved in such a job. . . . While admiration should be extended to this efficient officer, we find nothing in the evidence to disclose that he was performing any duties other than those which he would ordinarily be obligated to perform as chief of police of the city of Crawford.

Unfortunately, Mr. Eschenbrenner had missed being shot by a bullet, had missed other injury by external means in the fray, and had missed any slip, trip or fall in his office in city hall.

C. The court's granting of recovery in "extraordinary" exertion cases seems premised upon the assumption that whatever is unusual is, therefore, an "unexpected or unforeseen event." It would appear, however, that Mr. Knaggs' heart attack was much less an unexpected and unforeseen event from pushing a 1,500 pound deep freeze than it would have been from pushing a 500 pound refrigerator or a 300 pound oxygen tank. Yet, there is an indication that Mr. Knaggs would not have been allowed compensation for strain from the latter items alone.

If it is the pushing which must be unexpected or unforeseen, then why was it unexpected or unforeseen that Mr. Knaggs would have to push the equipment in order to paint the floor? Would he also have been involved in unusual overexertion if he had pushed the deep freeze twice before?—or five, eight or ten times? The mere fact that Mr. Knaggs had to push the deep freeze for the first time was apparently not controlling. Mr. Hladky had never before run an air hammer riveting gun, but he was denied compensation on the basis that this was part of his ordinary duties.

What the court was really saying was probably that having to push 1,500 pounds was simply more than Mr. Knaggs was employed to do. This means that the court must first determine in these cases what the assumption of risk level is for the employee involved. Mr. Knaggs, it would appear, had to assume the risk of a heart attack from pushing the 500 pound refriger-

¹²³ *Id.* at 48-49, 84 N.W.2d at 178.

ator, but not the 1,500 pound deep freeze. His employer could, however, have raised the assumption of risk level to 1,500 pounds by requiring Mr. Knaggs to move the 1,500 pound deep freeze more often.

This rule forces the courts to make an impossible decision concerning whether a specific act involves more or less exertion than the amount of exertion normally required of the employee. For example, in *Anderson*, the court was concerned, in part, whether walking through knee-deep snow involved greater exertion than stacking 100 pound sacks.¹²⁴ Conceivably, the answer would be different depending upon whether Mr. Anderson had strained his back, intestines, a vessel in his eye, or the vessels of his heart.

D. The current Nebraska decisions unfairly, and without statutory direction, discriminate against employees whose ordinary work causes physical injuries by strain or exertion. The determination is one of coverage. As a result, employees who are injured from work-connected strain in performing ordinary duties are denied any recovery for medical bills or temporary or permanent disability. These workers must either pay the bills and sustain the losses of disability or, along with their families and dependents, rely upon some form of charity.¹²⁵

Workers injured by external causes, however slight, receive the full benefits of the compensation law. Employees with ven-

¹²⁴ *Anderson v. Cowger*, 158 Neb. 772, 777, 65 N.W.2d 51, 57 (1954).

¹²⁵ See *Hayes v. McMullen*, 128 Neb. 432, 435, 259 N.W. 165, 167 (1935) (holding that snow blindness manifesting itself over a several hour period was a compensable accident): "It can hardly be doubted that the legislature had in mind, among other things, the protection of persons gainfully and honorably employed and who had received injuries in the course of their employment through no fault of their own, but could receive no compensation under common-law rules and who would be in danger of becoming public charges. They had in mind the placing of the burden upon the particular industry involved, rather than upon the public." The court in *Westcoatt v. Lilley*, 134 Neb. 376, 379, 278 N.W. 854, 856 (1938) stated: "This aim [to shift from the employee to modern industry the burden of economic waste or loss] includes a purpose to prevent an employee's dependents from becoming a public charge." The court in *Parson v. Murphy*, 101 Neb. 542, 545, 163 N.W. 847, 848 (1917) stated: "The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden."

ereal diseases may recover full benefits for slight scrapes which would not affect a normally healthy individual. A worker who stupidly trips or falls and is injured will recover full benefits for his entire resulting disability, regardless of underlying conditions of extreme physical or mental infirmity. These external cause and slipping rules reflect the basic objective of workmen's compensation to impose as a cost of production compensation for whatever injuries the production has in fact caused to the workmen. Employers and consumers must take the workmen as they are, and pay compensation for work-connected injuries.¹²⁶ Compensation is expected to be granted to healthy and unhealthy workmen, to careful and absent minded workmen, to employees of hazardous and nonhazardous occupations, to the strong and the weak, and for foreseeable and unforeseeable causes.

The ordinary exertion rules, however, draw a line between injuries caused by external means and those caused by internal body failure. A warehouseman who suffers a strained back, hernia, ruptured blood vessel, heart attack, or other injury from stacking 200 pound cartons would presumably be denied compensation. If the same employee, through inattention to his work or other carelessness, drops the carton or lets it slip, and then suffers the same injury, he will be granted full compensation benefits. In other words, the Nebraska decisions would deny compensation to the employee perfectly performing his duties, but grant compensation to one who manages somehow to misperform and injures himself by slipping or falling.

Suppose that the same employee lifting a 200 pound carton drops the carton or lets it slip because of a hangover (not sufficient to constitute "intoxication"¹²⁷) or because of a pre-existing arthritic condition in his hands or arms. Again, there is a

¹²⁶ See, e.g., *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 10, 43 N.W. 2d 522, 527 (1950): "It is true that the evidence shows plaintiff was not a strong and robust person. In truth it shows that he had physical afflictions from which it is easy to say that he was a person readily susceptible to disease and injury but this condition constitutes no bar to a right of recovery for accidental injury under the Workmen's Compensation Act. He has the right to have his award sustained if he has shown by a preponderance of the evidence that he sustained an injury, resulting from an accident arising out of and in the course of his employment even if preexisting disability combined to produce his disability."

¹²⁷ NEB. REV. STAT. §§ 48-109, -151(7)(c) (Reissue 1960). An employer is not liable for compensation for accidents caused by, or resulting in any degree from, the employee's intoxication at the time of the injury, such intoxication being without the consent, knowledge or acquiescence of the employer or the employer's agent.

slipping and compensation. Recovery would be denied to the employee with only a bad back, intestine, vessel, or heart, but granted to the same employee with an additional hangover or arthritis. Similarly, recovery would be denied to the warehouseman for strain in lifting the 200 pound cartons, but granted to an office employee required under unusual circumstances to move a desk or equipment of considerably lesser weight.

There is no statutory language compelling this distinction. Certainly, no social policy justifies this result. Mr. Brown, the fireman, certainly should not be denied compensation for breathing fumes and fighting a fire for several hours, but granted compensation merely because he absent-mindedly trips over a fire hose outside the building.¹²⁸ Mr. Eschenbrenner, the police chief, was denied compensation for injuries from his heroics in subduing an armed insane man. Mr. Eschenbrenner would undoubtedly have been entitled to compensation had he slipped in answering the telephone call in his office which reported the occurrence, and he would have been entitled to compensation had he slipped, tripped or fallen on his way to the men's room in city hall. Yet, just as surely as that slip had caused him personal injury, his exertion of apprehending the insane man caused his death. Mr. Anderson was more fortunate because he was normally required to engage in a considerably lesser degree of exertion as a traveling salesman, and the exertion from which he was injured occurred during a snowstorm.

E. The cases involving aggravation by an external event make it clear that a basic purpose of the workmen's compensation statute is to pay benefits for work caused disability regardless of an employee's underlying physical infirmities. The compensation statute generally imposes a considerably broader liability upon the economic product of an employer than the normal tort liability of third parties. The purpose of spreading workmen's compensation costs among a large segment of the

¹²⁸ Mr. Brown might be entitled to some benefits for injuries by exertion or strain under the firemen's pension system of the Omaha home rule charter or state law with respect to Lincoln and cities of the first class. Workmen's compensation disability benefits, if paid, would be deducted from the amount of the pensions payable under state law. The pension system, however, does not pay any medical benefits. Also, it covers only death, permanent and total disability, and temporary-total disability up to twelve months. Mr. Eschenbrenner, the policeman, might be entitled to benefits comparable to the firemen's pension, but only if he were employed in Omaha or Lincoln.

consuming public as a cost of protection justifies the broader coverage.¹²⁹

The Nebraska decisions are unique and anomalous in this regard. Both tort law and workmen's compensation involve borderline situations where the injured party has some latent infirmity which may be set off in a variety of ways. Not all aggravation cases fall into the category where a slight occurrence sets off a disastrous chain reaction, but some do. In these cases, the third party or the employer just happens to be at the wrong place at the wrong time and becomes the one to activate the underlying infirmity. As a matter of fact, the third party or the employment has caused the resulting harm, assuming that the burden of causal proof of activation is sustained. The injured person might never have suffered from the disability which he in fact sustained from the occurrence. Certainly, he would not have been injured at that time and in that manner. In the sense that death is inevitable, nothing unexpected has occurred, but the third party or the employment has in fact brought about the death or injury at least sooner than it would otherwise have occurred.

Some courts have been unwilling to extend tort liability to cover these extreme circumstances.¹³⁰ This has been done by a judicial limitation of the rules of duty and proximate cause. But in the famous "poison bran" case,¹³¹ the Nebraska Supreme Court handed down one of the most "liberal" tort interpretations of any court in the United States. The Nebraska court gave a recovery for the death of a purchaser of poison bran who fed the bran to his dairy herd and other animals. The purchaser died from a "decompensated heart caused by emotional disturbance" resulting in large part from an unreasonable fear that dairy customers would be harmed by drinking milk from the poisoned cows. Judge Carter, in a dissenting opinion joined in by Judge Eberly, felt that the death was not proximately caused by the negligent sale of the sack of poison bran, nor a foreseeable con-

¹²⁹ At most, tort liability places costs upon individual persons or businesses who must pass off or bear those costs within a competitive system. Through compulsory insurance, the workmen's compensation system imposes the risks of employee injuries upon all employers. The workmen's compensation expenses are more likely to be passed off by all employers having comparable costs in this regard because to this extent there is no competitive disadvantage in a price increase.

¹³⁰ See note 73 *supra*.

¹³¹ *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937), *rehearing denied*, 135 Neb. 232, 280 N.W. 890 (1938), noted in 18 NEB. L. BULL. 331 (1939).

sequence thereof; that the emotional upset was not caused by a fear of physical peril to himself or his own property; and that the seller of bran owed no duty to the buyer for this sort of mental distress.¹³²

Judge Carter's view has tended to prevail in the compensation area, however, where aggravation of infirmities by exertion or strain is involved. As a matter of causation, the poison bran case had held that no "impact" was necessary for recovery for negligently inflicted mental injuries. Yet, in a compensation case, Judge Carter wrote the majority opinion which denied compensation for emotional injuries to an elevator operator trapped for thirty minutes with a dying man who was being squashed to death between floors.¹³³ The majority opinion treated the elevator operator's mental breakdown as an "accident," but held that there was no "injury," as that term is defined, because there was no "violence to the physical structure of the body." As a result, Nebraska tort law does not require "impact," but the compensation statute, even with its liberal interpretation, requires something akin to an impact.

Judge Carter dissented in the *Schirmer* case, where the employee slipped slightly on the telephone pole, on what were essentially the same policy grounds as his dissent in the poison bran case. The employer should not have been held liable for what was at most a mere setting off of the employee's latent heart condition. Liability should not extend to a mere triggering of underlying physical disorders. An employer is not an insurer of the health of his employees. An employer is no more liable for injuries which are basically the product of pre-existing physical infirmities which occur during working hours than he would be if the same injury had occurred during nonworking hours. Factually, Judge Carter seems to have viewed most of the injuries involved in past exertion cases as being of the sort which would have been just as likely to have happened to the employee during nonworking hours, and to have been caused by factors other than the employment.

Judge Carter has forcefully and consistently applied the theory that neither a third party nor an employer should be

¹³² *Rasmussen v. Benson*, 135 Neb. 232, 241, 280 N.W. 890, 894 (1938). Judge Chappell, then a district judge sitting by designation, dissented from the original opinion, but was not sitting at the time of the motion for rehearing.

¹³³ *Bekelski v. O. F. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). Most jurisdictions take a more liberal view. See Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 8 (1961). See note 73 *supra*.

liable for a mere activation of a pre-existing infirmity where the resulting injury seems to be much more the product of the infirmity than of any conduct by the third party or employer. He dissented in the poison bran tort case. He dissented in the workmen's compensation case involving only a slight slipping.¹³⁴ He concurred in a separate opinion on this basis in the principal compensation case denying compensation for aggravation by exertion or strain in performing ordinary duties.¹³⁵

The result is that a majority of the court would generally impose liability for aggravation of pre-existing infirmities in both the tort and compensation cases regardless of the underlying nature of the infirmity. The compensation cases permit recovery for the total resulting disability where there is an external event or slipping, however slight. But the compensation cases are more restrictive than the poison bran case in denying compensation for aggravation of pre-existing infirmities by exertion or strain.

F. The problem of medical proof in aggravation cases generally is extremely difficult. At best, reliable medical testimony is normally only that it is "reasonably probable" that a certain work or trauma caused a certain injury. In many areas, there are medical controversies among recognized authorities as to the relationship between trauma or exertion and the incidence of an injury. The compensation claimant has a burden of showing the causal relation between the work and the injury, and this proof cannot rest upon mere "possibilities."

In a large number of compensation cases, the court has held that a specific injury to a specific employee was not shown by the compensation claimant to have arisen out of and in the course of employment.¹³⁶ An employee should not be entitled to com-

¹³⁴ See note 72 *supra*.

¹³⁵ See note 74 *supra*.

¹³⁶ *Gotfrey v. Sakurada*, 169 Neb. 879, 101 N.W.2d 470 (1960); *Nelson v. Frenchman-Cambridge Irrigation Dist.*, 168 Neb. 37, 95 N.W.2d 201 (1959); *Wynia v. Hoesing*, 167 Neb. 136, 91 N.W.2d 404 (1958); *McCauley v. Harris*, 164 Neb. 216, 82 N.W.2d 30 (1957); *Cole v. Cushman Motor Works*, 159 Neb. 97, 65 N.W.2d 330 (1954); *Ruderman v. Forman Bros.*, 157 Neb. 605, 60 N.W.2d 658 (1953); *Seger v. Keating Implement Co.*, 157 Neb. 560, 60 N.W.2d 598 (1953); *Miller v. Livestock Buying Co.*, 157 Neb. 51, 58 N.W.2d 596 (1953); *Hahl v. Heyne*, 156 Neb. 599, 57 N.W.2d 137 (1953); *McCoy v. Gooch Milling & Elevator Co.*, 156 Neb. 95, 54 N.W.2d 373 (1952); *Rahfeldt v. Swanson*, 155 Neb. 482, 52 N.W.2d 261 (1952); *Beam v. Goodyear Tire & Rubber Co.*, 152 Neb. 663, 42 N.W.2d 293 (1950); *Meester v. Schultz*, 151 Neb. 614, 38 N.W.2d 739 (1949); *Hassmann v. City of*

pensation for head injury where he cannot establish by admissible evidence, as he has claimed, that he was struck by a shovel.¹³⁷ Similarly, an employee should not be entitled to compensation for a heart attack¹³⁸ or back sprain¹³⁹ where there is no evidence that the employment did in fact cause the injury. Also, in the exertion cases, the statutory definition of the terms "injury" and "personal injury" states that they "shall not be construed to include disability or death due to natural causes but occurring while the employee is at work."¹⁴⁰

This burden of proof of showing employment-cause serves a useful purpose in the compensation system and should not be relaxed. The theory is that the employer and his product should bear the costs of injuries caused by the employment. In general, compensation is a substitute for tort liability and not health insurance in which an employer becomes a general insurer of the health of his workmen. Compensation is not intended to pay for the mere wearing out of the body of the employee. The physical wearing out is normally assumed to be paid for by wages. Any pensioning of superannuated or worn out workmen is left to be handled, if at all, as a separate social problem under the social security law and programs for the relief of needy persons. But having sustained a factual burden of establishing that the employment did cause a disability, or aggravate a pre-existing infirmity to a point of disability, the claimant should be entitled to compensation. As to that, the employment has been shown to have caused an injury to the employee which would not have occurred, at least at that time, place and form, were it not for the employment.

The current Nebraska exertion decisions have tended to intermix the accident requirement with issues of "arising out of

Bloomfield, 146 Neb. 608, 20 N.W.2d 592 (1945); *Williams v. Watson Bros. Transfer Co.*, 145 Neb. 466, 16 N.W.2d 199 (1945); *Hammond v. Doctor's Hosp.*, 145 Neb. 446, 17 N.W.2d 9 (1945); *Chambers v. Bilhorn, Bower & Peters, Inc.*, 145 Neb. 277, 16 N.W.2d 173 (1944); *Pixa v. Grainger Bros.*, 143 Neb. 922, 12 N.W.2d 74 (1943); *Zanski v. Yellow Cab & Baggage Co.*, 143 Neb. 340, 9 N.W.2d 302 (1943); *Mook v. City of Lincoln*, 143 Neb. 254, 9 N.W.2d 184 (1943); *Kaffenberger v. Iverson*, 142 Neb. 257, 5 N.W.2d 687 (1942); *Nollett v. Holland Lumber Co.*, 141 Neb. 538, 4 N.W.2d 554 (1942).

¹³⁷ *Haufe v. American Smelting & Ref. Co.*, 163 Neb. 329, 79 N.W.2d 570 (1956).

¹³⁸ See, e.g., *Duncan v. Weidman*, 143 Neb. 846, 11 N.W.2d 537 (1943).

¹³⁹ See, e.g., *Ramsey v. Kramer Motors, Inc.*, 155 Neb. 584, 52 N.W.2d 799 (1952).

¹⁴⁰ NEB. REV. STAT. § 48-151(4) (Reissue 1960).

and in the course of employment.”¹⁴¹ Most of the exertion cases have discussed factual issues that the employment was not shown to have caused the resulting injury. Had the decisions stopped at this point, there could not be justifiable criticism. The supreme court, in a trial de novo upon the record, makes a final determination whether the specific injury to the employee involved was caused in fact by that employee’s work.¹⁴²

Most of the supreme court’s decisions have not rested solely upon a holding that the work did not in fact cause the injury. They have virtually all gone on to state that even if the work did cause the injury, the injury was the product of “mere exertion, which is not greater than that ordinarily incident to the employment.” This shifts the issue from “arising out of and in the course of employment” to “by accident.” The appearance of the opinions is that the court is attempting to resolve by rule of law a group of cases in which the factual issues of causation and medical proof are extremely difficult. Most strain cases have not been decided exclusively upon either the issue of causal relationship or the ordinary exertion rules, although there are exceptions. To this degree, the opinions would appear to be using the ordinary exertion rules to avoid a definitive categorization of the cause in fact issues. It is submitted that the critical question is, and should be, solely whether the employment involved did in fact cause injury by exertion or strain.

One aspect of tending to intermix the questions of causation and accident is that the court has not given a liberal construction to the statutory accident requirement. The rule is that a court should give a liberal construction to the workmen’s compensation statute, but not to the questions of fact arising under the law.¹⁴³ In deciding the factual issues of whether or not the employment caused the resulting injury, no liberal interpretation should be applied to the evidence under Nebraska law. But the determination of whether or not the employee sustained an accident under the statutory definition would appear to be one of law to which a liberal construction should be given. In no way does it require a liberal interpretation of the evidence to permit compensation for routine exertion. It is the statutory language which should be construed liberally to carry out its originally intended and plain meaning.

¹⁴¹ NEB. REV. STAT. § 48-109 (Reissue 1960).

¹⁴² NEB. REV. STAT. § 48-165 (Reissue 1960).

¹⁴³ See note 102 *supra*.

G. Cases involving injury by exertion may present factual issues of causation which are extremely difficult to resolve. The charges run as follows:

(1) The testimony concerning cause in fact in many cases may be that of the injured person alone. To a degree, the presence of an external event or of a slipping serves as corroboration that the employee was injured at a definite time, place and from a specific cause. The absence of an unexpected external event could make it difficult for witnesses or the parties to remember significant facts concerning the cause of injury.

(2) Employers have difficulty in properly defending claims unless they have some notice at the time of a specific event to gather and preserve reliable evidence. In the slipping cases, an employer must establish basically that a particular slipping did not cause the alleged injury. In exertion cases, he may have a broader practical obligation of having to show that the injury did not arise from any work duties.

(3) Exertion cases are more likely to rest on matters of personal opinion as to causation than the objective facts of an external event or slipping. Impartial witnesses may serve to verify the slipping whereas an exertion case is primarily a battle of experts called to testify on behalf of the interested parties—not only as to the cause of the injury, but, in some cases, to the validity or existence of the alleged cause itself.

(4) Granting recoveries for injuries caused by exertion might cause false testimony as to causation or malingering as to duration.

The current Nebraska rules denying recovery for ordinary exertion are, admittedly, mechanical rules of easy application. It is possible to dispose of the case by application of the mechanical rule of law and avoid a resolution of complex issues of causation.¹⁴⁴ This argument simply states that it is more expedient to deny compensation to some deserving claimants than to resolve a larger number of possibly difficult cases. In the process, compensation is denied to some claimants whose cases are not the least bit difficult.

¹⁴⁴ See, e.g., *Hladky v. Omaha Body & Equip. Co.*, 172 Neb. 197, 203, 109 N.W.2d 111, 114-15 (1961): "We do not think it is necessary for this court to decide which theory was correct. Whichever was true his condition was not caused by an accident within the meaning of the Workmen's Compensation Act. Neither was it caused by exertion which was greater than that ordinarily incident to the employment. Even if such ordinary exertion combined with a pre-existing disease produced disability, it is not under that act compensable."

Essentially, the issues in the "run-of-the-mill" exertion cases are no more impossible of legal and medical proof than most other types of cases involving aggravation of pre-existing infirmities. The court has held that what is ordinary exertion for an employee may cause him injury. The Nebraska court has held that specific injuries may be shown by competent evidence to have been caused by exertion, even heart attacks which may be the most difficult injury to prove medically. These decisions indicate that ordinary exertion from some employments, without any slipping, could cause a heart attack,¹⁴⁵ strained back,¹⁴⁶ strained abdominal muscles,¹⁴⁷ a paralytic stroke¹⁴⁸ or hemorrhage¹⁴⁹ from ruptured blood vessels.

The exertion cases have their own background of corroborative evidence. Employers generally supervise their employees, and fellow employees are in a position to observe the conduct of the work accomplished, and, to a degree, some symptoms of the physical health of other employees. A number of exertion cases will tie the injury specifically and directly to definite exertion, having as precise a location as to time, place, and causation as cases involving an external event or slipping.¹⁵⁰ Many external event or slipping cases arise in settings which are considerably less than conclusive on the issues of causation, and the court resolves these cases under accepted rules of burden of proof and fact determination.

The testimony in some of the external violence or slipping cases consists primarily of the evidence of the injured party alone. Unwitnessed slippings occur, and witnessed strains occur. There is no reason why the burden of proof, or the giving of notice to the employer, should be different in an exertion case than is

¹⁴⁵ *Knaggs v. City of Lexington*, 171 Neb. 135, 105 N.W.2d 727 (1960); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954).

¹⁴⁶ *Pittenger v. Safeway Stores, Inc.*, 166 Neb. 858, 91 N.W.2d 31 (1958); *Gilbert v. Metropolitan Util. Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953); *Tucker v. Paxton & Gallagher Co.*, 153 Neb. 1, 43 N.W.2d 522 (1950); *Dymak v. Haskins Bros.*, 132 Neb. 308, 271 N.W. 860 (1937).

¹⁴⁷ *Derr v. Kirkpatrick*, 106 Neb. 403, 184 N.W. 91 (1921).

¹⁴⁸ *Manning v. Pomerene*, 101 Neb. 127, 162 N.W. 492 (1917).

¹⁴⁹ *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N.W. 688 (1930).

¹⁵⁰ See, e.g., *Feagins v. Carver*, 162 Neb. 116, 75 N.W.2d 379 (1956); *Jones v. Yankee Hill Brick Mfg. Co.*, 161 Neb. 404, 73 N.W.2d 394 (1955); *Eschenbrenner v. Employers Mut. Cas. Co.*, 165 Neb. 32, 84 N.W.2d 169 (1957); *Manning v. Pomerene*, 101 Neb. 127, 162 N.W. 492 (1917).

now required in the external injury or slipping cases. In either case, recovery means only that those employees who can establish work-caused injuries are entitled to compensation. Essentially the same types of witnesses concerning factual and medical causation are available in either case. The latent injury rules today call upon employers to defend some cases where there has not been notice at the time of the operative facts, and require an employee to sustain a burden of proof with respect to a period of time in which he may not have known he was injured.

There is no more reason to assume that an employee would be in a better position to present false claims of ordinary strain than is now offered him to supply the magical words of "slip, trip or fall." The argument essentially is that no claims for injuries from exertion should be allowed because these claims are difficult to decide and false claims may be presented. Thus, the argument goes, even legitimate and proven claims should be denied. Especially in the light of the realistic purposes of workmen's compensation, it would seem desirable to provide compensation for those claimants who can establish a work-caused injury, and, if the system needs protection against false claims, to devote further attention to those matters as that need demands.

H. There is a possibility that relaxing the ordinary exertion bar to workmen's compensation could cause an unwarranted number of new claims to be filed on behalf of any worker injured at work or at any time remotely related to his having performed work. The argument is that there would be a strong incentive for every worker to claim that every injury to him arose from his employment. The *ad hoc* nature of making these factual decisions could result in increased litigation, preventing some workers unable to bear the expenses of litigation from any recovery or forcing them to make disadvantageous compromises. An increase in litigation would defeat an objective of workmen's compensation of making a prompt payment, and would delay recoveries by deserving claimants.

There is no reason why permitting recovery to workers injured by the strain of ordinary work should interfere with recovery of compensation by other employees who are now entitled to recover for injuries caused by an external event or slipping. Also, there need not be an unwarranted number of claims or increased litigation if the court does not relax the burden of proof requirements. Eliminating the ordinary exertion bar merely means that those deserving employees who can establish by admissible evidence that their work did in fact cause them an injury will be paid compensation. Not one of the overwhelm-

ing majority of states allowing recovery for routine exertion has amended its statutes to deny such compensation. And the reported decisions in the increasing number of states which have switched from the strict Nebraska rule to a more liberal rule do not reflect a substantial long run increase in litigation.

I. An abandonment of the ordinary exertion rules would undoubtedly add costs to the over-all compensation program. Compensation would be payable to workers who now must pay for their own work-caused injuries, themselves, or rely upon some form of charity. It does not seem unjust to add these costs of work-connected injuries to the costs of doing business. Theoretically, these added costs of production could not be passed off by Nebraska employers through an increase in the prices of their goods because of the competition by employers in other states. As a practical matter, the increase in rates, if any, would undoubtedly be negligible in terms of total production costs. Nebraska producers do not now operate at an ascertainable advantage over Iowa and Minnesota employers where there is no accident requirement at all.¹⁵¹ And Nebraska producers were not at a competitive disadvantage for the twenty or more years in which compensation was payable in Nebraska for routine exertion. On the strictly theoretical plane, even if there were an added cost of goods to consumers because of personal injuries caused by the production of these goods, it would seem to be more socially desirable to sustain the slight increase in the over-all cost of consumer goods than to force the burden upon the individual employee whose work has caused him harm, and the family and dependents of the worker. In an economic sense, it is more desirable to provide some form of employment insurance paid for by the consumers of the product than to redress work-caused injuries to destitute workers, and their dependents and families, through outright charity and other accepted welfare systems.

¹⁵¹ Many items, of course, affect the cost of workmen's compensation insurance. For example, Nebraska and Minnesota provide full medical benefits, but Iowa does not. Nebraska (49%) lags behind Minnesota (54%) and Iowa (55%) on the ratio of maximum weekly disability benefits to average weekly wages in the state. It is understood that commercial insurance companies wrote \$8,056,344.00 in direct premiums in 1959 in Nebraska, and sustained direct losses of \$4,166,964.00. Since then, medical costs have gone up and insurance rates have been increased. It would seem that an increase in workmen's compensation rates from covering ordinary exertion would provide increased revenues for commercial companies writing workmen's compensation insurance through the increase in dollar volume of the expense loading factor.

J. From the standpoint of social policy, it is also more desirable to prevent injuries than to redress them after they occur. It is better to have people working and healthy than injured and compensated. One of the objectives of workmen's compensation is to encourage employers to guard against physical injuries to employees by providing safe places to work and maintaining effective supervision. This is carried out through premium reductions for past favorable experience and by surveillance by insurance companies.

It would seem that employers could be expected to take some similar steps to guard against purely internal physical injuries caused by the work. Physical examinations may be used as safety inspections and supervision maintained as to the proper performance of duties. The employer and the consumer of the employer's product should bear the costs of protecting against work-caused internal injuries to the same extent as is now done in the case of the violent external injuries. As it now stands, employers in really strenuous occupations would theoretically need to use little caution in selecting physically fit employees for difficult jobs, because the employees, themselves, would assume all of the risks of internal body failure from the strain of performing the most demanding types of work.

If employers really do try to guard against the risks of internal physical breakdown of the employee, then, also theoretically, elderly, handicapped, obese, and otherwise impaired persons, and even persons with comparatively minor physical limitations, would find their employment opportunities severely limited.¹⁵² Today, however, employers must pay full compensation to these people for work-connected injury in virtually every way other than by strain. This includes full compensation for any aggravation "by accident" of any pre-existing infirmity. These categories of persons may now find their employment opportunities limited, and in part, because of a feared increased risk of physical harm.¹⁵³

¹⁵² See 1 LARSON, WORKMEN'S COMPENSATION LAW 567 (1952): "[I]t will not be surprising to find employers imposing stiffer physical qualifications and refusing to hire men with any kind of heart history or symptoms."

¹⁵³ These factors have been present since the beginnings of workmen's compensation. See Walton, *Workmen's Compensation and The Theory of Professional Risk*, 11 COLUM. L. REV. 36, 45 (1911): "Experience in both France and England goes to show that the Workmen's Compensation Acts greatly prejudice the chances of employment of workmen whose health is unsound or who are subject to any partial incapacity. . . . Similar considerations apply to old men or those who have a tendency to disease. The employer has

To the extent this fear is justified, it would seem socially desirable to deter these persons from jobs which may be quite dangerous to them into other lines of endeavor. In a free labor market, the acceptance of employment by these persons in jobs which are hazardous to them theoretically results in an acceptance by them of a lower wage scale and forces them to assume the risks of internal body injury. Theoretically, the free market would adjust the wage scale for compensation benefit increases, if any, resulting from the employment of impaired workers rather than healthy workers. And the compensation system generally has reduced assumption of employment risks by employees.

The real answer to these questions lies not in depriving all workers of compensation for exertion. Employees should be entitled to compensation for those injuries which their work has caused them. The answer for the seriously impaired or disabled individuals would appear to be in a realistic revamping of the basic concepts of the operation of an adequate second injury fund mechanism¹⁵⁴ and taking more effective action concerning rehabilitation and re-employment of impaired workers. At present, the compensation owed to a disabled worker who suffers additional injury is not clear; the second injury fund mechanism is woefully deficient; there is no rehabilitation program whatsoever under the compensation system, and the efforts at retraining and re-employment, although sincere, are left to agencies outside the compensation system and are not as effective as they might be. It is simply not fair to use these deficiencies in the overall compensation scheme to deny compensation to the many employees whose work has in fact caused them injury by strain or exertion.

every inducement to employ as far as possible only young and robust workmen. The Poor Law Report of 1909 in England lays considerable weight on this as one of the causes of pauperism. Unless the labor unions allow elderly men, or men suffering from some infirmity or tendency to disease, to be employed at less than the fixed minimum rate of wages, there is ground to fear lest the Workmen's Compensation Acts, intended to be remedial, should be seriously prejudicial to the interests of such workmen."

¹⁵⁴ It would seem that the second injury fund might be designed to cover employees with any known physical impairment, whether or not disabling. Employers would be encouraged to inspect the health of workers. Upon proper notice to and verification by the fund, the fund, would share the compensation obligation with the employer. *But cf.* 1 LARSON, WORKMEN'S COMPENSATION LAW 567 (1952): "It is far from clear, however, that any such device can be adapted to the present problem, in which the pre-existing condition is apt to be quite vague, and in which the ultimate result is usually the indivisible disaster of death."

VII. CONCLUSION

The current Nebraska decisions denying workmen's compensation for work-caused injuries to employees merely because the injuries are the product of ordinary exertion or strain are directly contrary to the intended meaning of the compensation statute and to fundamental concepts of workmen's compensation. These rules should be changed forthwith by judicial decision or legislative revision or both.

The ordinary exertion rules have had an adult life of twenty years in Nebraska, following an infancy of seven years. During the last twenty years, there has been no disagreement among members of the court as to the statement or meaning of the rules, and no legislative change of the rules.¹⁵⁵ It may be contended that *stare decisis* plus legislative acquiescence should now preclude any change in the judicial position of the Nebraska Supreme Court.

But *stare decisis* and legislative acquiescence did not preclude the adoption of the present rules by the court following a similar period under the opposite rules. For the first twenty years under the compensation statute, the Nebraska Supreme Court had, without exception, held that the statute contemplated an unexpected or unforeseen injury, whether the injury resulted from strain in the performance of the employee's ordinary duties or from an external occurrence or a slip, trip or fall. The overwhelming majority of states allow compensation for injuries caused by strain from doing routine work. The courts of Arizona,¹⁵⁶ Arkansas,¹⁵⁷ Florida,¹⁵⁸ and Michigan¹⁵⁹ have aban-

¹⁵⁵ There has been at least one unsuccessful legislative attempt to eliminate the entire accident requirement. L.B. 715, 72nd Neb. Leg. Sess. (1961).

¹⁵⁶ *In re Mitchell*, 61 Ariz. 436, 150 P.2d 355 (1944), *overruling Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 26 P.2d 1017 (1933).

¹⁵⁷ *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956).

¹⁵⁸ *Gray v. Employers Mut. Liab. Ins. Co.*, 64 So. 2d 650 (Fla. 1952).

¹⁵⁹ *Coombe v. Penegor*, 348 Mich. 635, 83 N.W.2d 603 (1957); *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 598-99, 83 N.W.2d 614, 623 (1957): "To those who fear the unsettling effect of overruling precedent, it should be noted that certainty in the law is impeded, not aided, by a court's ostensible adherence to *stare decisis*, while avoiding the effect thereof through the process of distinguishing cases on trivial fact differentiations, which, having served their purpose in one case, are abandoned in the next. In short, the doctrine of *stare decisis* is beneficial and desirable but it should neither be used as a crutch, substituting the majesty of its authority for the drudgery of research and exposition, nor as a cyclone cellar in which we of the court can find ready refuge from the hurricane

done the ordinary exertion rules by judicial decisions on the theory of inherent judicial power to apply the correct rule of law to the case at bar in spite of what may have been misapplications of the rule in the past.¹⁶⁰

Although it would not be the only method, the simplest method of legislative correction of the present serious inequity would be merely to add the words "*or result*" following "unexpected or unforeseen event" in the statutory definition of "accident."¹⁶¹ The current judicial decisions have, for practical purposes, added the word "external" before "event," contrary to what was thought and held to be the original intention in the use of the phrase "unexpected or unforeseen event." The addition of these two words, "*or result*," can clarify definitively what has become an unfair deprivation of compensation to deserving workers for injuries which have in fact been caused them by their employment.

born of our own mistakes. *Stare decisis*, then, upon both reason and authority, offers no obstacle to our judicial corrections of our past error. Has our error, however, been ratified by the legislature? . . . In shortest terms, bluntly put, the argument is that silence gives consent. It is suggested that we accord this catch phrase the dignity of a legal axiom. . . . There is not a shred of justification therefor under these circumstances. Silence at best is ambiguous."

¹⁶⁰ At least one state has refused to change its usual exertion rules judicially. See *Hensley v. Farmers Fed'n Co-op.*, 246 N.C. 274, 280-81, 98 S.E.2d 289, 293-94 (1957): "We are aware that the interpretation given to our statute does not harmonize with the interpretation given by a majority of the courts to the compensation statutes of their States. . . . If the question was now presented for the first time, we would feel at liberty to give more consideration to the reasoning of the cases which reach conclusions differing from our own, but we are not dealing with a new question. Twenty years and more ago the Court placed its interpretation on the Act. . . . The interpretation so consistently given to the statute is as much a part of the statute as if expressly written in it. We have no right to change or ignore it. If it is to be changed, it must be done by the Legislature, the law-making power. If, in its wisdom a change is desirable, it can readily do so."

¹⁶¹ The amended section would read: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event *or result* happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." A similar amendment was enacted in Florida, although the Florida court had repudiated the usual exertion rules the previous year in a four to three decision. *Gray v. Employers Mut. Liab. Ins. Co.*, 64 So. 2d 650 (Fla. 1952); Florida Laws c. 28238, § 1 (1953). See also, e.g., OHIO REV. CODE ANN. § 4123.01 (Page Supp. 1960) (injury includes "any injury, whether caused by external accidental means or accidental in character or result. . . ."); ORE. REV. STAT. § 656.002 (19) (Supp. 1959) ("An injury is accidental if the result is an accident, whether or not due to accidental means.").